

BIENNIAL REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF NORTH CAROLINA

VOLUME 29
1946 - 1948

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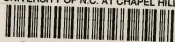
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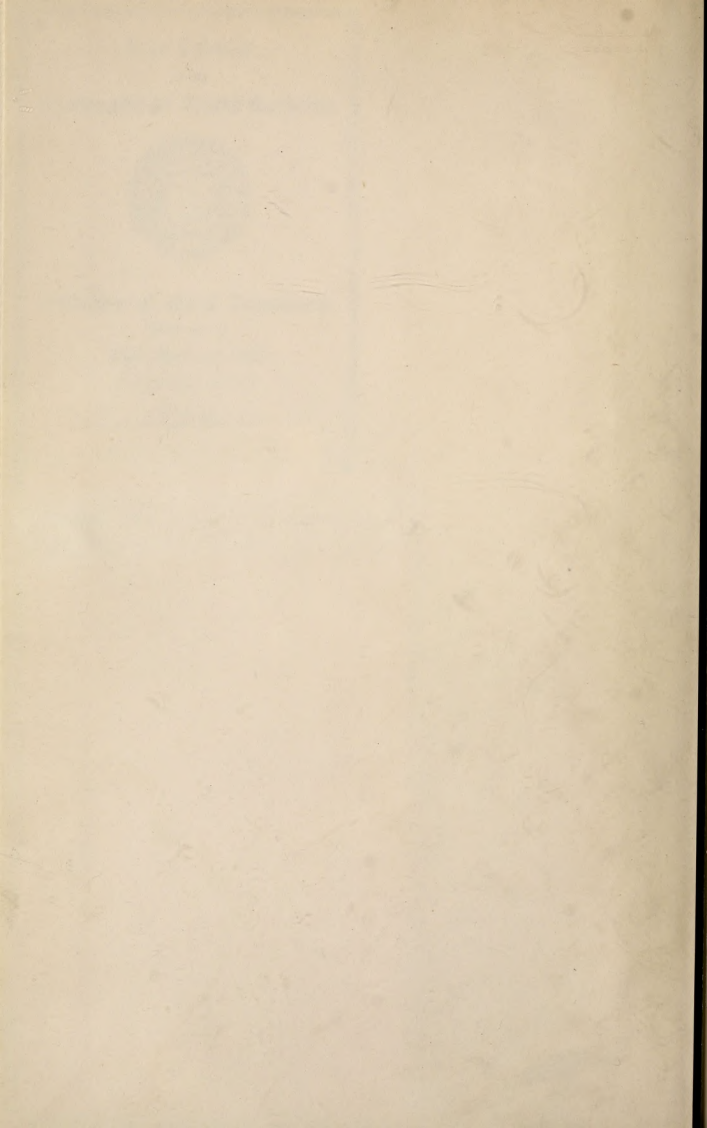
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BIENNIAL REPORT
OF THE
ATTORNEY GENERAL
OF THE
STATE OF NORTH CAROLINA

VOLUME 29
1946-1948

HARRY McMULLAN
ATTORNEY GENERAL

T. W. BRUTON
HUGHES J. RHODES
RALPH MOODY
JAMES E. TUCKER
FRANK P. SPRUILL, JR.*
PEYTON B. ABBOTT*
ASSISTANT ATTORNEYS GENERAL

Mr. Spruill resigned July 1, 1947.
Mr. Abbott was appointed July 1, 1947.

LIST OF ATTORNEYS GENERAL SINCE THE ADOPTION OF CONSTITUTION IN 1776

	<i>Term of Office</i>
Avery, Waightsill	1777-1779
Iredell, James	1779-1782
Moore, Alfred	1782-1790
Haywood, J. John	1791-1794
Baker, Blake	1794-1803
Seawell, Henry	1803-1808
Fitts, Oliver	1808-1810
Miller, William	1810-1810
Burton, Hutchins G.	1810-1816
Drew, William	1816-1825
Taylor, James F.	1825-1828
Jones, Robert H.	1828-1828
Saunders, Romulus M.	1828-1834
Daniel, John R. J.	1834-1840
McQueen, Hugh	1840-1842
Whitaker, Spier	1842-1846
Stanly, Edward	1846-1848
Moore, Bartholomew F.	1848-1851
Eaton, William	1851-1852
Ransom, Matt W.	1852-1855
Batchelor, Joseph B.	1855-1856
Bailey, William H.	1856-1856
Jenkins, William A.	1856-1862
Rogers, Sion H.	1862-1868
Coleman, William M.	1868-1869
Olds, Lewis P.	1869-1870
Shipp, William M.	1870-1872
Hargrove, Tazewell L.	1872-1876
Kenan, Thomas S.	1876-1884
Davidson, Theodore F.	1884-1892
Osborne, Frank I.	1892-1896
Walser, Zeb V.	1896-1900
Douglas, Robert D.	1900-1901
Gilmer, Robert D.	1901-1908
Bickett, T. W.	1909-1916
Manning, James S.	1917-1925
Brummitt, Dennis G.	1925-1935
Seawell, A. A. F.	1935-1938
McMullan, Harry	1938-

LETTER OF TRANSMITTAL

1 December 1948

To His Excellency
R. GREGG CHERRY, Governor
Raleigh, North Carolina

Dear Sir:

In compliance with statutes relating thereto, I herewith transmit the report of the Department of Justice for the biennium 1946-1948.

Respectfully yours,

HARRY McMULLAN,
Attorney General

402704

THE JOURNAL OF THE
AMERICAN MEDICAL ASSOCIATION

LETTER OF TRANSMITTAL

TO THE EDITOR OF THE JOURNAL OF THE
AMERICAN MEDICAL ASSOCIATION
FROM THE
PRESIDENT OF THE
AMERICAN MEDICAL ASSOCIATION
AND THE
BOARD OF TRUSTEES
OF THE
AMERICAN MEDICAL ASSOCIATION

4072004

EXHIBIT I

CIVIL ACTIONS PENDING OR DISPOSED OF IN THE COURTS OF NORTH CAROLINA

PENDING IN SUPERIOR COURTS OF NORTH CAROLINA

American Tobacco Company v. Maxwell, Commissioner of Revenue.
Burroughs Adding Machine Company v. Gill, Commissioner of Revenue.
Frank O. Sherrill v. Hugh MacRae Company, Inc., et al.
State and Department of Agriculture, et al. v. Jesse Carpenter, et al.
Dr. J. R. Spencer v. State Board of Health.
J. A. Adkins v. B. D. Perry.
Pure Oil Company v. Maxwell, Commissioner of Revenue.
R. L. Lewis and Huger S. King v. Johnson, State Treasurer.
Catherine J. Ward, et al. v. Jessup and Commissioner of Revenue.
Ina Ericson v. E. E. Ericson, et al. and University of North Carolina.
Collis Lewis (by next friend) v. State Board of Education.
State ex rel. Insurance Commissioner v. Keystone Mutual Casualty Company.
Utilities Commission v. Atlantic Coast Line, Seaboard Air Line and Southern Railway Companies.
Plantation Pipe Line Company v. Gill, Commissioner of Revenue.
Wake County v. University of North Carolina and Albert Cox, Trustee.
L. G. Squires v. L. C. Rosser and H. J. Hatcher (Motor Vehicle Dept.)
Waldean Stephens, et al. v. Board of Graded School Trustees, et al.
Mary Price, Chairman, etc. v. State Board of Elections, et al.
First Citizens Bank & Trust Company, Executor, v. Alfred Hollingsworth, et al.

DISPOSED OF IN THE SUPERIOR COURTS OF NORTH CAROLINA

General Motors Corporation v. Doughton, Commissioner of Revenue (2 cases).
Freeland v. State School for the Blind, et al.
P. M. Nesbitt v. Gill, Commissioner of Revenue.
Gill, Commissioner of Revenue v. Bank of French Broad, garnishee in the matter of L. L. McLean, Taxpayer.
State Board of Education v. Gallop, et al. and Woodhouse, et al.
H. P. Brandis, et al. v. The Trustees of Davidson College, et al.
Mrs. Clara W. Geer v. Gill, Commissioner of Revenue.
Genevieve H. West, et al. v. Department of Conservation and Development.
Quay D. Williford v. Algodon Manufacturing Company, et al.
Atlantic Greyhound Corporation, et al. v. North Carolina Utilities Commission.

Garrou Knitting Mills v. Gill, Commissioner of Revenue.
T. W. Stevens v. Commissioner of Motor Vehicles.
R. Shelton White v. Commissioner of Motor Vehicles.
Wachovia Bank and Trust Company, et al. v. Bitting Shelton,
et al.
Wachovia Bank and Trust Company, et al. v. Harry McMullan,
Attorney General, et al.
Maultry Rogers v. Commissioner of Motor Vehicles.
University of North Carolina v. Unknown Heirs of Donald M.
Steffee.
University of North Carolina v. E. O. Guerrant, Trustee of
American Island Mission, etc.
University of North Carolina v. Unknown Heirs of Joseph Futch.
Mrs. Mary Grey Sabine v. Gill, Commissioner of Revenue.
H. P. Brandis, et al. and Trustees of Davidson College v. Harry
McMullen, Attorney General, et al.
E. L. Henderson v. Board of Trustees of East Carolina Teachers
College.
State ex rel. Gill, Commissioner of Revenue v. Victor B. Higgins,
Jr.
Henderson, et al., doing business as Henderson Flower Shop, v.
Gill, Commissioner of Revenue.
Charlie Cox v. Rosser, Commissioner of Motor Vehicles.
State ex rel. Gill, Commissioner of Revenue v. Singer, trading
as Singers Jewelers.

PENDING BEFORE NORTH CAROLINA INDUSTRIAL COMMISSION

Mary Dale Pearson v. North Carolina School for the Deaf.
University of North Carolina and Russell M. Grumman v. John
C. Hebditch, et al.
Mrs. Willie Riddick v. State Board of Education.
Dora Jacobi v. University of North Carolina.
C. E. Ward v. State Hospital at Morganton.
Iola Williams Jones v. Board of Buildings and Grounds.
Mrs. Alex. T. Hester v. Board of Buildings and Grounds.
Elizabeth Hanna v. Guilford County Board of Education.
Hugh Anderson Johnson v. Warren County Board of Education.
J. H. Tadlock v. Bertie County Board of Education, et al.
DeLoatch v. Extension Service, State College and/or Gaston
County Board of Commissioners.

DISPOSED OF BEFORE NORTH CAROLINA INDUSTRIAL COMMISSION

Robert Farley v. Division of Forestry and Parks, Dept. of Con-
servation and Development.
Riggsbee v. University of North Carolina.
Catherine Hargrove v. State Board of Education.
Ernest Basnight v. State School Commission.
Laurence C. Doll v. North Carolina State College.

Isaac Earl Brown v. Division of Forestry and Parks, Dept. of Conservation and Development.
A. W. Perry v. North Carolina State College.
Woodrow D. Leatherman v. State Hospital at Morganton.
Lester C. Long v. Division of Forestry and Parks, Dept. of Conservation and Development.
Edward D. Todd v. Department of Conservation and Development.
Walter Miles, et al. v. State Board of Education.
Herman Grissom v. Department of Conservation and Development.
Genevieve H. West, et al. v. Department of Conservation and Development.
Marcus Hill v. Department of Conservation and Development.
J. Clingman Griffin v. State Hospital Extension.

PENDING IN THE SUPREME COURT OF NORTH CAROLINA

Wachovia Bank and Trust Company, et al. v. Harry McMullan, Attorney General, et al.
Mrs. Mary Grey Sabine v. Gill, Commissioner of Revenue.

DISPOSED OF IN THE SUPREME COURT OF NORTH CAROLINA

State Board of Education v. Martha W. Gallop, et al.
Gill, Commissioner of Revenue v. L. L. McLean.
P. M. Nesbitt v. Gill, Commissioner of Revenue.
In Re: Revocation of License to operate Motor Vehicle.
Atlantic Greyhound Corporation v. Utilities Commission.
Garrou Knitting Mills v. Gill, Commissioner of Revenue.

APPEALS PENDING IN UNITED STATES SUPREME COURT

George D. Whitaker, et al v. State of North Carolina.
E. E. Gentry v. State of North Carolina.

APPEALS DISPOSED OF IN UNITED STATES SUPREME COURT

Marvin Claude Bell v. State of North Carolina.
Philip M. Koritz, et al. v. State of North Carolina.
John Henry Brunson, et al. v. State of North Carolina.
Chester Hedgebeth v. State of North Carolina.

DISPOSED OF IN DISTRICT COURT OF UNITED STATES

U. S. of America, on relation of Tennessee Valley Authority v. George Whitcomb, et al.

PENDING IN DISTRICT COURT OF APPEALS

Jeannette A. Noel v. Edson B. Olds, Jr. et al (Ackland Will Case).

PENDING BEFORE INTERSTATE COMMERCE COMMISSION

State of North Carolina and Utilities Commission v. Aberdeen and Rock Fish Railroad Company.

EXHIBIT II

LIST OF CRIMINAL CASES ARGUED BY THE ATTORNEY GENERAL AND HIS ASSOCIATES BEFORE THE NORTH CAROLINA SUPREME COURT: FALL TERM, 1946; SPRING TERM, 1947; FALL TERM, 1947; SPRING TERM, 1948.

FALL TERM, 1946

- State v. Absher, from Wilkes; murder first degree; defendant appealed; new trial; 226 N. C. 656.
- State v. Ayers, from Avery; violating liquor laws; defendant appealed; affirmed; 226 N. C. 579.
- State v. C. Beasley, from Johnston; possessing punch board — resisting officer; defendant appealed; affirmed; 226 N. C. 580.
- State v. W. Beasley, from Johnston; violating liquor laws; defendant appealed; error and remanded; 226 N. C. 577.
- State v. Beatty, et al., from Gaston; A. W. I. rape; defendant appealed; no error; 226 N. C. 745.
- State v. Benton, from Richmond; rape; defendant appealed; new trial; 226 N. C. 765.
- State v. Biggerstaff, from Burke; operating motor vehicle under influence of liquor; defendant appealed; no error; 226 N. C. 603.
- State v. Blackwell, from Gaston; A. D. W.; defendant appealed; no error; 226 N. C. 760.
- State v. Blair, from Guilford; embezzlement; defendant appealed; reversed; (per cur.) 227 N. C. 70.
- State v. Bowen, from Pitt; operating motor vehicle under influence of liquor; defendant appealed; no error; 226 N. C. 601.
- State v. Brown, from Randolph; violating motor vehicle laws; defendant appealed; no error; 226 N. C. 681.
- State v. Burgess, from Cabarrus; A. W. I. rape; defendant appealed; no error; 226 N. C. 771.
- State v. Cogdale, from Craven; breaking and entering — A. W. I. rape; defendant appealed; no error; 227 N. C. 59.
- State v. Ellison, from Watauga; murder second degree; defendant appealed; new trial; 226 N. C. 628.
- State v. Fairley, from Robeson; manslaughter; defendant appealed; new trial; 227 N. C. 134.
- State v. Floyd, from Northampton; murder first degree; defendant appealed; no error; 226 N. C. 571.
- State v. Gardner, from Buncombe; manslaughter; defendant appealed; no error; 227 N. C. 37.
- State v. Gause, from New Hanover; murder first degree; defendant appealed; new trial; 227 N. C. 26.
- State v. Grimes, from Nash; assault on female; defendant appealed; venire de novo; 226 N. C. 523.
- State v. Harrell, from Hertford; murder first degree; defendant appealed; dismissed; (per cur.) 226 N. C. 743.

- State v. Jackson, from Gaston; A. D. W.; defendant appealed; no error; 226 N. C. 760.
- State v. Johnson and Primus, from Wake; rape; defendants appealed; no error; 226 N. C. 671.
- State v. Jones, et al., from Yadkin; breaking, entering, larceny; defendants appealed; new trial; 227 N. C. 47.
- State v. Jones, from Durham; bigamy; defendant appealed; reversed; 227 N. C. 94.
- State v. Kelly, from Anson; operating motor vehicle under influence of liquor; defendant appealed; new trial; 227 N. C. 62.
- State v. Law, et al., from Forsyth; larceny and receiving; defendants appealed; reversed; 227 N. C. 103.
- State v. Martin, from Forsyth; murder first degree; defendant appealed; no error; 227 N. C. 108.
- State v. Matthews, et al., from Sampson; murder first degree; defendants appealed; no error; 226 N. C. 639.
- State v. Maynor, etc., from Sampson; violating liquor laws; defendant appealed; affirmed; 226 N. C. 645.
- State v. Montgomery, from Union; murder first degree; defendant appealed; remanded; 227 N. C. 100.
- State v. Mumford, from Durham; assault on female—breaking and entering; defendant appealed; no error; 227 N. C. 132.
- State v. McKnight, from Caldwell; breaking and entering; defendant appealed; no error; 226 N. C. 766.
- State v. Overcash, from Cabarrus; A. W. I. rape; defendant appealed; new trial; 226 N. C. 632.
- State v. Owenby, from Buncombe; carnal knowledge; defendant appealed; new trial; 226 N. C. 521.
- State v. Perry, et al., from Nash; A. D. W.; defendant appealed; no error; 226 N. C. 530.
- State v. Peterson, from Sampson; voluntary manslaughter; defendant appealed; no error (per cur.); 226 N. C. 770.
- State v. Revels, et al., from Robeson; A. W. I. kill; defendants appealed; no error; 227 N. C. 34.
- State v. Rogers, from Mecklenburg; A. W. I. rape; defendant appealed; affirmed; 227 N. C. 67.
- State v. Smith, et al., from Mecklenburg; violating liquor laws; defendants appealed; no error; 226 N. C. 738.
- State v. Thomas, from Hoke; receiving stolen goods; defendant appealed; dismissed; 227 N. C. 71.
- State v. Thompson, from Lenoir; manslaughter; defendant appealed; no error; 226 N. C. 651.
- State v. Thompson, et al., from Robeson; rape; defendants appealed; no error; 227 N. C. 19.
- State v. Wilson, from Guilford; violating liquor laws; defendant appealed; no error; 227 N. C. 43.

DOCKETED AND DISMISSED ON MOTION

- State v. Nelson, from Richmond.
State v. Stack, from Mecklenburg.
State v. Nash, from Wake.
State v. Ewing, from Bladen.
State v. Whitchard, from Cherokee.

SPRING TERM, 1947

- State v. Artis, from Duplin; murder first degree; defendant appealed; no error; 227 N. C. 371.
State v. Blanton, (Baird, Shore), from Mecklenburg; conspiracy to suborn perjury; defendant Shore appealed; no error; 227 N. C. 517.
State v. Boldin, from Orange; manslaughter; defendant appealed; no error; 227 N. C. 594.
State v. Brown, from Wake; rape; defendant appealed; no error; 227 N. C. 383.
State v. Brunson, from Forsyth; assault on female; defendant appealed; no error (per cur.); 227 N. C. 558.
State v. Cannon, from Wake; perjury; defendant appealed; no error; 227 N. C. 336-338.
State v. Davenport, from Pitt; conspiracy to defraud, etc; defendant appealed; no error; 227 N. C. 475.
State v. Ewing, from Cumberland; manslaughter; defendant appealed; no error; 227 N. C. 535.
State v. Godwin, from Cumberland; violating liquor laws; defendant appealed; new trial; 227 N. C. 449.
State v. Horton, from Wilkes; murder first degree; defendant appealed; no error; 227 N. C. 250.
State v. Hough, from Forsyth; manslaughter; defendant appealed; no error; 227 N. C. 596.
State v. James, et al., from Forsyth; injury to property, etc.; defendants appealed; no error (per cur.); 227 N. C. 558.
State v. Johnson, from Forsyth; A. W. I. Rape; defendant appealed; new trial; 227 N. C. 587.
State v. Johnson, from Edgecombe; violating liquor laws; defendant appealed; no error (per cur.); 227 N. C. 703.
State v. Jones, from Forsyth; disturbing peace, etc.; defendant appealed; no error (per cur.); 227 N. C. 561.
State v. Jones, et al., from Durham; violating liquor laws; defendants appealed; no error (per cur.); 227 N. C. 703.
State v. Jones, et al., from Columbus; simple assault—attempted highway robbery; defendant C. R. Jones appealed; no error; 227 N. C. 402.
State v. Johnnie Jones, from Edgecombe; disorderly conduct — A. D. W.; defendant appealed; reversed; 227 N. C. 170.
State v. Jordan, from Forsyth; abortion; defendant appealed; reversed; 227 N. C. 579.

- State v. King, from Forsyth; disturbing peace, etc.; defendant appealed; no error (per cur.); 227 N. C. 559.
- State v. Kirksey, from Columbus; murder first degree; defendant appealed; no error; 227 N. C. 445.
- State v. Koritz, et al., from Forsyth; resisting, etc., police officer; defendant appealed; no error; 227 N. C. 552.
- State v. Litteral and Bell, from Wilkes; rape; defendants appealed; no error; 227 N. C. 527.
- State v. Moore, from Pitt; A. W. I. rape; defendant appealed; new trial; 227 N. C. 326.
- State v. Phillips, from Harnett; murder first degree; defendant appealed; no error; 227 N. C. 277.
- State v. Pritchard, from Beaufort; slander; defendant appealed; no error; 227 N. C. 68.
- State v. Ragland, from Martin; rape; defendant appealed; no error; 227 N. C. 162.
- State v. Silver, from Franklin; assault on female; defendant appealed; reversed; 227 N. C. 352.
- State v. Staton, from Union; murder second degree; defendant appealed; new trial; 227 N. C. 409.
- State v. Thomas, et al., from Lee; larceny; defendant appealed; no error; 227 N. C. 249.
- State v. Warren, et al., from Pitt; larceny, conspiracy, etc.; defendant Warren appealed; no error; 227 N. C. 380.
- State v. Watkins, et al., from Forsyth; A. D. W., resisting, etc., officers, etc.; defendants appealed; no error (per cur.); 227 N. C. 560.
- State v. Wolfe, et al., from Wayne; assault, breaking and entering; defendants appealed; new trial; 227 N. C. 461.
- State v. Yow, from Forsyth; receiving stolen goods; defendant appealed; reversed; 227 N. C. 585.

DOCKETED AND DISMISSED ON MOTION

- State v. Sanders, et al., from Johnston.
- State v. McLeod, from Scotland.

FALL TERM, 1947

- State v. Bishop, from Buncombe; violating anti-closed shop; defendant appealed; no error; 228 N. C. 371.
- State v. Brooks, et al., from Henderson; murder first degree; defendants appealed; no error; 228 N. C. 68.
- State v. Carson, from Cleveland; abandonment; defendant appealed; reversed; 228 N. C. 151.
- State v. Childress, from Surry; murder second degree; defendant appealed; new trial; 228 N. C. 208.
- State v. Coffey, from Caldwell; murder second degree; defendant appealed; reversed; 228 N. C. 119.
- State v. Correll, from Wilkes; manslaughter; defendant appealed; new trial; 228 N. C. 28.

- State v. Dawson, from Lenoir; involuntary manslaughter; defendant appealed; no error; 228 N. C. 85.
- State v. DeBerry, from Wake; A. D. W.; defendant appealed; no error; 228 N. C. 147.
- State v. DeMai, from Nash; murder first degree; defendant appealed; no error; 227 N. C. 657.
- State v. Dickey, et al., from Rutherford; A. W. I. rape—assault on female; defendants appealed; no error (per cur.); 227 N. C.
- State v. Edwards, et al., from Wake; larceny—A. D. W.; defendants appealed; no error; 228 N. C. 153.
- State v. Ensley, from Cumberland; murder second degree; defendant appealed; no error; 228 N. C. 271.
- State v. Flinchem, from Wilkes; operating motor vehicle under influence of liquor; defendant appealed; reversed; 227 N. C. 149.
- State v. Flinchem, from Wilkes; reckless driving; defendant appealed; new trial; 227 N. C. 149.
- State v. Forshee, from Cumberland; A. W. I. kill; defendant appealed; no error; 228 N. C. 268.
- State v. Foster, et al., from Wilkes; gambling; defendants appealed; error and remanded; 228 N. C. 72.
- State v. Gibbs, from Yancey; violating liquor laws; defendant appealed; no error; 227 N. C. 677.
- State v. Harvey, from Craven; manslaughter; defendant appealed; reversed; 228 N. C. 62.
- State v. Hedgebeth, from Washington; A. D. W.-robbery; defendant appealed; affirmed; 228 N. C. 259.
- State v. Hooper, from Buncombe; burglary first degree; defendant appealed; new trial; 227 N. C. 633.
- State v. Law, et al., from Forsyth; larceny and receiving; defendants appealed; no error; 228 N. C. 443.
- State v. Little, from Durham; murder first degree; defendant appealed; new trial; 228 N. C. 417.
- State v. Lovelace, from Mecklenburg; violating Bangs Disease regulation; State appealed; special verdict; reversed; 228 N. C. 186.
- State v. Minton, from Wilkes; manslaughter; defendant appealed; new trial; 228 N. C. 15.
- State v. McMahan, from Guilford; involuntary manslaughter; defendant appealed; no error; 228 N. C. 293.
- State v. Phillips, from Durham; false pretense; defendant appealed; judgment arrested; 228 N. C. 446.
- State v. Pool, from Mecklenburg; crime against nature; defendant appealed; affirmed without written opinion; 228 N. C.
- State v. Randolph, from Mecklenburg; A. W. I. kill; defendant appealed; no error; 228 N. C. 228.
- State v. Reavis, from Davie; violating liquor laws; defendant appealed; reversed; 228 N. C. 18.
- State v. Riddle, et al., from Madison; murder second degree; defendants appealed; new trial; 228 N. C. 251.

- State v. Simmons, from Sampson; rape; defendant appealed; new trial; 228 N. C. 258.
- State v. Snead, from Harnet; murder second degree; defendant appealed; new trial; 228 N. C. 37.
- State v. Stanley, from Edgecombe; murder first degree; defendant appealed; no error; 227 N. C. 650.
- State v. Stiles, from Cherokee; nonsupport; defendant appealed; new trial; 228 N. C. 137.
- State v. Sullivan, from Buncombe; breaking and entering; defendant appealed; error and remanded; 227 N. C. 680.
- State v. Warren and Brown, from Wilkes; larceny and receiving; defendants appealed; Warren—reversed; Brown—no error; 228 N. C. 22.
- State v. Weaver, from Harnett; manslaughter; defendant appealed; new trial; 228 N. C. 39.
- State v. Webb, from Moore; perjury; defendant appealed; no error; 228 N. C. 304.
- State v. Whitaker, et al., from Buncombe; violation anti-closed shop law; defendants appealed; no error; 228 N. C. 352.
- State v. Wiggins, from Craven; sci. fa. and capias; effect of vacating order; appeal by sureties on bond; reversed; 228 N. C. 76.
- State v. Woolard, from Beaufort; carnal knowledge; defendant appealed; new trial; 227 N. C. 645.
- State v. Yancey, from Cumberland; false pretense; defendant appealed; reversed; 228 N. C. 313.

DOCKETED AND DISMISSED ON MOTION

- State v. O'Dear and Messer, from Jackson.
- State v. Cherry, from Northampton.
- State v. Douglas, from Davie.
- State v. Johnson, et al., from Wilkes.
- State v. Little, from Wake.
- State v. Lampkin, et al., from Mecklenburg.
- State v. Breeze, from Orange.

SPRING TERM, 1948

- State v. Alston, from Warren; murder second degree; defendant appealed; new trial; 228 N. C. 555.
- State v. Anderson, from Pitt; arson—murder first degree; defendant appealed; no error; 228 N. C. 720.
- State v. Baker, from Richmond; unlawful practice of medicine; defendant appealed; no error; 229 N. C. 73.
- State v. Barrier, from Cabarrus; violating liquor laws; defendant appealed; error and remanded; 228 N. C. 951.
- State v. Bell, et al., from Yadkin; robbery with firearms; defendants appealed; (1) no error; (2) reversed; 228 N. C. 659.
- State v. Bryant, from Pitt; carnal knowledge; defendant appealed; no error; 228 N. C. 641.

- State v. Choate, from Surry; criminal abortion; defendant appealed; new trial; 228 N. C. 491.
- State v. Culberson, from Davie; murder second degree; defendant appealed; no error; 228 N. C. 615.
- State v. Daniel, from Wilson; A. W. I. kill; defendant appealed; new trial; 228 N. C. 536.
- State v. Gardner, from Buncombe; manslaughter; defendant appealed; no error; 228 N. C. 567.
- State v. Gentry, from Caldwell; embezzlement; defendant appealed; no error; 228 N. C. 643.
- State v. Glidden Company, from Caldwell; polluting waters; State appealed; affirmed; 228 N. C. 664.
- State v. Grant, from Swain; manslaughter; defendant appealed; new trial; 228 N. C. 522.
- State v. Hammond, et al., from Davidson; murder first degree; defendants appealed; no error; 229 N. C. 108.
- State v. Hawley, from Granville; murder first degree; defendant appealed; new trial; 229 N. C. 167.
- State v. Holbrook, from Yadkin; violating liquor laws; defendant appealed; no error; 228 N. C. 582.
- State v. Holbrook, from Yadkin; operating motor vehicle intoxicated—reckless driving; defendant appealed; no error; 228 N. C. 620.
- State v. Hooks, from Randolph; rape; defendant appealed; no error; 228 N. C. 689.
- State v. Jackson, from Burke; murder first degree; defendant appealed; no error; 228 N. C. 656.
- State v. Larkin, from Robeson; receiving stolen goods, etc.; defendant appealed; new trial; 229 N. C. 126.
- State v. Love, from Robeson; violating liquor laws; defendant appealed; new trial; 229 N. C. 99.
- State v. Massengill, et al., from Johnston; larceny; defendants appealed; new trial; 228 N. C. 612.
- State v. Minton, from Edgecombe; breaking and entering; defendant appealed; reversed; 228 N. C. 518.
- State v. Peterson, from Duplin; violating liquor laws; defendant appealed; no error; 228 N. C. 736.
- State v. Phillips, from Harnett; murder first degree; defendant appealed; no error; 228 N. C. 595.
- State v. Ray, from Vance; hit and run driving; defendant appealed; reversed; 229 N. C. 40.
- State v. Speller, from Bertie; rape; defendant appealed; reversed; 229 N. C. 67.
- State v. Steelman, from Wilkes; reckless driving; defendant appealed; no error; 228 N. C. 634.
- State v. Sutton, from Washington; assault on female; defendant appealed; no error; 228 N. C. 534.
- State v. Swink, from Guilford; rape; defendant appealed; new trial; 229 N. C. 123.
- State v. West, from Robeson; violating liquor laws; defendant appealed; new trial; 229 N. C. 99.

State v. Wooten, et al., from Martin; manslaughter; defendants appealed; no error; 228 N. C. 628.

DOCKETED AND DISMISSED ON MOTION

State v. Jenkins, from Jackson.
 State v. Stanley, from Buncombe.
 State v. Connor, from Buncombe.
 State v. Parrot, from Lenoir.
 State v. Pulliam, from Rockingham.

SUMMARY

Affirmed on Defendant's Appeal	87
Affirmed on State's Appeal	1
New trial or reversed on Defendant's Appeal	56
Reversed on State's Appeal	1
Error and remanded	4
Remanded for judgment	1
Judgment arrested	1
Appeals Dismissed	21
	<hr/>
	172

FEES TRANSMITTED BY ATTORNEY GENERAL TO STATE TREASURER SINCE FEBRUARY TERM, 1946, THROUGH FEBRUARY TERM, 1948

State v. Biggerstaff	\$10.00
State v. Bowen	10.00
State v. Thompson	10.00
State v. Stack	10.00
State v. Maynor	10.00
State v. Brown	10.00
State v. Burgess	10.00
State v. Smith, et al	20.00
State v. Beasley	10.00
State v. Perry, et al	20.00
State v. Beatty, et al	30.00
State v. Blackwell	10.00
State v. Peterson	10.00
State v. McKnight	10.00
State v. Matthews, et al	20.00
State v. Thomas	10.00
State v. Cogdale	10.00
State v. Montgomery	10.00
State v. Revels, et al	20.00
State v. Rogers	10.00
State v. Jackson	10.00
State v. Mumford	10.00
State v. Pritchard	10.00
State v. Wilson	10.00

State v. Phillips	10.00
State v. Johnson	10.00
State v. Cannon	10.00
State v. Ayers	10.00
State v. Thomas, et al	20.00
State v. Warren	10.00
State v. Brunson	10.00
State v. King	10.00
State v. Jones	10.00
State v. James, et al	20.00
State v. Watkins, et al	40.00
State v. Jones and Haithecock	20.00
State v. Ewing	10.00
State v. Litteral and Bell	10.00
State v. Blanton (Shore)	10.00
State v. Koritz, et al	30.00
State v. Boldin	10.00
State v. Davenport	10.00
State v. Jones	10.00
State v. Gardner	10.00
State v. Stanley	10.00
State v. Warren, et al	10.00
State v. Gibbs	10.00
State v. DeMai	10.00
State v. DeBerry	10.00
State v. Pool	10.00
State v. Randolph	10.00
State v. Johnson, et al	10.00
State v. Hedgbeth	10.00
State v. Bishop	10.00
State v. Law, et al	20.00
State v. Ensley	10.00
State v. McMahan	10.00
State v. Whitaker, et als	70.00
State v. Dawson	10.00
Nesbitt v. Gill	20.00
State v. Dickey and Logan	20.00
State v. Sutton	10.00
State v. Holbrook	10.00
State v. Holbrook	10.00
State v. Culberson	10.00
State v. Gentry	10.00
State v. Bell, et al	20.00
State v. Steelman	10.00
State v. Bryant	10.00
State v. Wooten and Ward	20.00
State v. Peterson	10.00
State v. Baker	10.00
State v. Webb	10.00

 \$980.00

SUMMARY OF ACTIVITIES

STAFF PERSONNEL

There were several important changes in the staff personnel during the biennium. Mr. T. W. Bruton, after serving as Lieutenant-Colonel in the Army of the United States, returned to the office on July 15, 1946, having been on leave of absence since July 3, 1942. Mr. Frank P. Spruill, Jr., resigned as Assistant Attorney General and returned to the practice of law. Mr. James E. Tucker, who had been a member of the legal staff since 1939 was named as Assistant Attorney General and assigned to the Revenue Department.

Under authority of an Act of the last Legislature increasing the staff of this office, Mr. Peyton B. Abbott was appointed as Assistant Attorney General and assigned to the Revenue Department.

Mr. Philip E. Lucas resigned his position as a member of the staff and entered private practice. Mr. Forrest H. Shuford, II, was appointed a member of the research staff on June 1, 1947, and is now serving in that capacity. Mr. Calder W. Womble was appointed a member of the research staff of the office on September 1, 1947, and is now serving in that capacity. Assistant Attorney General Ralph Moody and Assistant Attorney General Hughes J. Rhodes served throughout the biennium.

The secretarial staff of the office during the biennium was as follows: Mrs. Margaret York Wilson, Miss Elizabeth Flournoy, Miss Ruby Thomas, Miss Elizabeth Kelly, Miss Lillian Turner, Mrs. Grace H. Baker, Mrs. Betty Smith and Miss Laurie Barefoot.

By Chapter 114 of the Session Laws of 1947 a member of the staff of this office was assigned to the duties provided by law in connection with the General Statutes Commission, to be known as the Revisor of Statutes. Mr. Harry W. McGalliard, who had theretofore acted in that capacity, was named to this position.

Mr. Clifton W. Beckwith continued to act as the Director of the Division of Legislative Drafting and Codification of Statutes and also as the head of the Statistical Division of the office.

STATE BUREAU OF INVESTIGATION

During the biennium, Mr. Walter F. Anderson continued to act as Director of this Bureau. By reason of increased appropriations made by the last General Assembly, his staff was increased to meet the demands being made upon them for service within the field of its operations.

There is included in the Biennial Report the report made by Mr. Anderson, as Director of the Bureau of Investigation, to which attention is directed.

REVENUE DEPARTMENT AND MOTOR VEHICLES DEPARTMENT

In accordance with the statute, Mr. James E. Tucker and Mr. Peyton B. Abbott, as Assistant Attorneys General, were assigned to the Revenue Department and also acted as the immediate contact members of this staff for the Motor Vehicles Department.

The greatly increased tax collections of the Department of Revenue necessitated more than the usual amount of legal advice to the Commissioner of Revenue and other officials of this department. The Attorney General is required to approve all refunds made by the Department of Revenue. This assignment involves a large amount of work as the refunds are very numerous. During the biennium a total of 7491 were approved; 250 were rejected. We are pleased to acknowledge the finest possible cooperation on the part of the Commissioner of Revenue, Mr. Edwin Gill, and all of his staff. During the biennium he has provided additional office space in the Revenue Building, so that that branch of the office is now comfortably housed and has a very complete library, necessary in dealing with matters of taxation.

The State was fortunate in avoiding any large amount of tax litigation. At a later point this report will call attention to litigation now pending and settled during the biennium, affecting this department of the State Government.

The General Assembly of 1947 enacted two very important Acts, one known as the Motor Vehicle Highway Safety Act, Chapter 1067 of the Session Laws of 1947, and the other the Motor Vehicle Safety and Responsibility Act, Chapter 1006 of the Session Laws of 1947.

The administration of these two Acts has greatly increased the duties imposed upon the Commissioner of Motor Vehicles and has necessitated a great deal of work in the legal department of the State. In the drafting of this legislation and in the administration of it, the Assistant Attorneys General assigned to the Revenue Department and the Motor Vehicles Department have rendered an extensive service. I am glad to acknowledge the fine cooperation of the Commission of Motor Vehicles, Colonel L. C. Rosser, and the other officials of that department. The enactment of these laws has greatly increased the work of this office, in addition to rendering the legal services necessary in the assessment and collection of motor vehicle taxes collected by the Motor Vehicles Department.

DIVISION OF LEGISLATIVE DRAFTING AND CODIFICATION OF STATUTES

During the session of the General Assembly of 1947, the facilities of this office were extensively employed by the members of the General Assembly and State and local officials in the drafting of legislation which was considered at that time. The total number of bills prepared in this office during the session was 1750, many of which were written several times before getting in final form for presentation.

While the assistance rendered in the preparation of bills consumed a great deal of time, it is believed that this service is of such value to the State as to justify the attention given it. The General Assembly has heretofore adopted Resolutions expressing appreciation of the service performed for them. It is a source of satisfaction to have been able to render this service, as required by Article 2 of Chapter 114 of the General Statutes.

The General Statutes Commission, created by Chapter 157 of the Session Laws of 1945, continued to function during the biennium and rendered a valuable service in the careful and painstaking way in which they performed the duties of their office. The personnel of the Commission during

the biennium was as follows: Mr. Robert F. Moseley, who was elected Chairman, Mr. I. M. Bailey, Mr. I. Beverly Lake, Mr. Luther E. Barnhardt, Mr. Frank W. Hanft, Mr. Fred B. Helms, Mr. Malcolm McDermott, Mr. Henry A. McKinnon and Mr. Ralph H. Ramsey, Jr. Near the end of the biennium, Mr. Albert R. Menard, Jr. succeeded Mr. Lake. Mr. Harry W. McGalliard, as Revisor of Statutes, acted as the Executive Secretary of this Commission, with the assistance of Mr. Clifton W. Beckwith, who sat with the Commission at all of its meetings. A full report of the activities of the Commission will be made to the General Assembly by the Commission, as required by law.

As required by law, the division has had the responsibility of the codification of the Acts of the General Assembly to be included in the annual supplements to the General Statutes, published by The Michie Company. Unfortunately, due to the great delay of the publication of the Session Laws of 1947 and the delay incident to the difficulties of the publishers in securing adequate help, the supplement was late in being delivered. Every effort will be made at the next session to secure a more prompt publication of the supplement.

In accordance with the contract entered into between the Attorney General and The Michie Company, The Michie Company has by written contract assigned to the State of North Carolina an equal copyright interest in and to the following editorial features of the General Statutes of North Carolina:

(1) The statutory arrangement which is defined to include the "catch lines" and topics and the historical citations at the end of each statute to prior session laws or codes in which the statutes or parts thereof may be found;

(2) The tables of contents;

(3) The frontal analyses;

(4) and the comparative tables, on the condition that the State shall allow the Company to use at any time, those comparative tables prepared or supplied by the State and incorporated in the 1943 Edition of the General Statutes of North Carolina.

Due to the bulk now attained by the four volumes of the General Statutes, it is obvious that consideration will have to be given to the republication of the General Statutes to include the laws enacted after the 1949 session of the General Assembly. Plans for the republication of the General Statutes will have to be made well in advance and it is, therefore recommended that some consideration be given to this subject by the next General Assembly.

The work of the Division of Criminal and Civil Statistics has continued under the direction of Mr. Clifton W. Beckwith. There is included in this Biennial Report a compilation of the statistics covering the activities of our criminal courts, other than the courts of justices of the peace, and a summarization of the civil cases tried in our Superior Courts during the biennium. The recommendation is renewed that was heretofore made that some plan be worked out to pay the clerks of the Superior Court and inferior courts a reasonable fee for the service rendered in preparing and submitting the statistical reports required of them. This is an onerous service for which no compensation is provided.

OFFICE CONFERENCES AND CONSULTATIONS WITH STATE OFFICERS AND DEPARTMENTAL OFFICIALS

In accordance with the provisions of the Constitution and laws of this State, the Attorney General is made the legal advisor for all State officers, departments, bureaus and institutions, and during the biennium the performance of this duty has called for numerous office conferences and oral and written opinions furnished to solve the legal questions presented. This report includes a number of written opinions furnished State officials. The numerous office conferences are not recorded and no statistics are accumulated as to the time and results of these conferences.

Appreciation is expressed to Governor R. Gregg Cherry, and all other State officials, for the splendid cooperation which we have received during the biennium and the assistance they have given to us in performing this service.

ADVISORY OPINIONS TO LOCAL OFFICIALS

The practice which has been followed in this State for many years of furnishing advisory opinions to county, city and other local officials has been continued with increased demands being made upon the office. The services rendered in this respect consume a great deal of the time of the Attorney General and his Assistants in attempting to answer the numerous questions of administrative law and procedure which arise in local governments. The service has been one which is apparently appreciated by local officials and has doubtless resulted in solving many local problems and provided uniformity in practice and procedure in the important functions of local government.

While the opinions of this office furnished to local officials are advisory only, they are generally accepted as a method of determination of problems which could not otherwise be settled. A digest of the opinions of the office to local officials is published in *POPULAR GOVERNMENT*, a magazine of the Institute of Government of the University of North Carolina, and some of these opinions are periodically carried in the press of the State. Digests of opinions of special interest to cities and towns are mimeographed and distributed through the North Carolina League of Municipalities. The rendering of advisory opinions to local governments, while unofficial, is an important function and responsibility of the office.

STATE BANKING COMMISSION

During the biennium the Attorney General has sat as an *ex officio* member of the State Banking Commission and has participated in the consideration of many problems confronting this commission. A report of the activities of this commission will be made through the Commissioner of Banks.

STATE BOARD OF ASSESSMENT

As an *ex officio* member of the State Board of Assessment, the Attorney General has sat in at the meetings of this board during the biennium. It is recommended that consideration be given to provide an Executive Secretary

for the State Board of Assessment who will give his entire time to consideration of the problems of assessment of property of the public utilities and other duties of the office. The functions are now performed by the Director of the Franchise Division of the Department of Revenue.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM

As required by law, this department has furnished legal services to the Board of Trustees of the Retirement System during the biennium. We have had fine cooperation from its Director, Mr. Nathan H. Yelton. The legal work in this connection grows with the increasing responsibilities and payments being made by the system to retired State employees. No particular legal problems have arisen to cause any difficulty during the biennium.

STATE BOARD OF PUBLIC WELFARE AND STATE COMMISSION FOR THE BLIND

During the biennium this office has acted as legal advisor for the State Board of Public Welfare and State Commission for the Blind. Numerous legal opinions and office conferences have been required in order to perform this service. We have had the finest cooperation from Dr. Ellen Winston, Commissioner of Public Welfare, and Mr. H. A. Wood, Executive Secretary of the State Commission for the Blind, and other officials of the two agencies.

The important work done by these social agencies in caring for the needs of the worthy people of the State has involved many legal questions. It has been a source of satisfaction to have been able to cooperate in their solution.

STATE DEPARTMENT OF AGRICULTURE

Frequent conferences with officials of the State Department of Agriculture have been necessary to render legal assistance in problems which have arisen in that department. Many legal opinions were given during the biennium and numerous office conferences held. The expanding duties of the Department of Agriculture, touching in so many ways the life of the people of the State, have been a source of many problems, which we hope have been satisfactorily solved. We are glad to acknowledge the fine cooperation of the Commissioner of Agriculture, Mr. W. Kerr Scott, and all the members of his staff.

DEPARTMENT OF CONSERVATION AND DEVELOPMENT

The Department of Conservation and Development is one of the larger State Departments. The extent of the functions now performed by this department, includes the administration of state forests and parks, forest fire controls, the protection and development of forests, the promotion and development of commerce and industry, and the administration of the commercial fishery laws and the propagation of fish and oysters. The Department constantly calls upon the facilities of this office for legal assistance. This office has attempted to serve all of these demands, and wishes to acknowledge with appreciation the cooperation it has had from the director, Mr. R. Bruce Etheridge, and his entire staff.

INDUSTRIAL COMMISSION AND WORKMEN'S COMPENSATION PAYMENTS

All state employees, except the elected officials, are subject to the provisions of the Workmen's Compensation Act. It necessarily follows that with so many people employed, there are numerous accidents arising out of and in the course of employment, some of which are fatal. The total amount of Workmen's Compensation claims now exceeds \$75,000.00 a year, and the tendency is for a steady increase in these payments. While the State Highway and Public Works Commission has handled the settlement of claims through its own legal staff arising out of injuries to its employees, much of the time of this office is spent in examining and making appearances before the North Carolina Industrial Commission, on account of injuries sustained by the employees of all the state departments, boards, commissions and institutions, except the State Highway and Public Works Commission.

During the past biennium, it has been necessary for members of the staff of this office to make personal appearances before the North Carolina Industrial Commission at its hearings in the many sections of the State. Appearances have been made as far east as Manteo and as far west as Murphy. This office is delighted to render this service, since in my opinion, every claim against the State should be passed upon from a legal standpoint, in apt time before an agreement for compensation is entered into. I wish to take this opportunity to express my thanks to the heads of the several departments, boards, commissions and institutions for the fine cooperation which I have had in servicing these claims.

NORTH CAROLINA WILDLIFE RESOURCES COMMISSION

The 1947 North Carolina General Assembly created the North Carolina Wildlife Resources Commission and placed under it the duties heretofore performed by the North Carolina Game Commission and Division of Inland Fisheries. This department has a large number of employees, and many legal problems arise from time to time which merit the attention of this office. It has been a pleasure to advise and counsel with the head of the Commission as to its many legal problems.

OTHER STATE DEPARTMENTS AND AGENCIES

During the biennium, this office has had numerous requests for conferences and oral and written advisory opinions to other State departments, agencies and institutions. Among the ones most frequently calling upon us for legal assistance and advice have been the State Board of Alcoholic Control, the Banking Department, the Adjutant General's Office, the Budget Bureau, the State Board of Elections, the Local Government Commission, the Division of Purchase and Contract, and the various other boards and commissions.

During the course of the biennium, the staff of the office has had occasion to be called upon by all of the State departments, institutions and agencies for legal assistance and advice. The demands for brevity in this summary exclude a detailed statement of these matters.

CRIMINAL CASES OF SPECIAL INTEREST

*State v. George Whitaker, A. M. DeBruhl, T. G. Embler, H. E. Setzer,
J. E. Rogers, Fred Black and R. B. Robertson, 228 N. C. 352*

The defendants, George Whitaker, an employer, and A. M. DeBruhl, an officer and agent of the Asheville Building and Construction Trades Council, and others, officers and agents of local trade unions and organizations, were charged with executing a written agreement or contract whereby persons not members of certain Labor Unions and Organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment, and whereby said unions acquire an employment monopoly in any and all enterprises which may be undertaken by said employer, all of which was in violation of Sections 2, 3, and 5 of Chapter 328 of the Session Laws of 1947.

The defendants were convicted in the Police Court of the City of Asheville and appealed to the Superior Court where each of the defendants was convicted by a jury. The defendants then appealed to the Supreme Court alleging: (1) A violation of the statutes in question did not amount to a criminal offense; and (2) the statutes in question were enacted in violation of Article I, Section 17, of the Constitution of North Carolina, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution, and in violation of the freedom of speech in Assembly guaranty of the First Amendment.

The Supreme Court found that a violation of the statutes did amount to a criminal offense. It further held that the State, by general legislative act, may, in the exercise of its police power, condemn private contracts found to be injurious to the public welfare. As the action of the Legislature was found to be neither arbitrary nor capricious, and had a reasonable relation to the end sought to be accomplished, the Supreme Court held that in the result of the trial below there was no error.

The defendants have perfected an appeal to the Supreme Court of the United States in this action and appeal is now pending in that Court.

State v. Thomas Pinkney Bishop, 228 N. C. 371

This was a companion case to STATE v. WHITAKER, 228 N. C. 352, and the constitutional issues raised here were answered in that case. The defendant was found guilty of violating Chapter 328, Session Laws of 1947, in that he did require an employee to remain a member of a labor union. The defendant appealed to the Supreme Court.

The defendant alleged that, as the statute did not declare the violation thereof to be criminal nor provide a penalty therefor, a violation of said statute would not amount to a criminal act. The Supreme Court held that where a statute enacted in the public interest commands an act to be done or prescribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as a misdemeanor as at Common Law.

State v. Hammond, 229 N. C. 108

The defendants, George Hammond and Henderson Wilson, were indicted in the Superior Court of Davidson County upon a charge of first degree murder in connection with the killing of Robert B. Hayes. The evidence disclosed that on the night of October 31st, 1947, the defendants entered a store and filling station which the deceased owned and operated, killed the deceased with a car jack, broke open a cash box and fled. Both of the defendants voluntarily confessed to having committed the crime. They were convicted of murder in the first degree and appealed to the Supreme Court from the judgment rendered on the verdict. The Supreme Court, after considering the exceptions, found no error in the trial below.

State v. Davenport, 227 N. C. 475, ("Big Apple" Case)

The defendant, along with C. T. Jones, Johnnie Heath, J. R. Hunning, S. H. Powers, Al Whorton and Wilson Boyles, was indicted upon charges of conspiracy to obtain money by means of false pretense and of obtaining money under false pretense at the August Term, 1944, Pitt County Superior Court. The trial in the Superior Court in this case consumed a period of five weeks. The defendant was convicted upon these charges and appealed to the Supreme Court.

The record on appeal to the Supreme Court consisted of more than 1200 pages of evidence, including exhibits, and contained 440 assignments of error and more than 1700 exceptions.

The evidence discloses that the defendant and his associates concocted a scheme whereby they were to borrow money and pay interest thereon at the rate of five per cent (5%) per week and loan it out at an interest rate of ten per cent (10%) per week. According to the State's evidence, in the furtherance of this scheme, the defendant borrowed more than \$1,900,-000.00 over a short period of time and during this time loaned out only about one-tenth of the amount of money he had received on deposit from his victims.

On the appeal to the Supreme Court, the defendant's counsel filed a voluminous brief and argued all of his exceptions. It was a laborious and painstaking task for the staff of this office to prepare the State's brief and argue the case before the Supreme Court. The Court very carefully considered all the assignments of error and decided that no prejudicial error was committed in the trial of the case below.

State v. Charlie Phillips, 227 N. C. 277

The defendant in this case was tried under a bill of indictment charging the first degree murder of his wife. The evidence disclosed that he shot and killed his wife in culmination of family discord occasioned by his infidelity and bigamous marriage to another woman. The State's evidence was largely circumstantial, and the defendant, in his first appeal, relied wholly upon his motions to nonsuit. The Court held, however, that the evidence was sufficient to be submitted to the jury, and the defendant was convicted of the crime charged.

Shortly before the date set for his execution, however, an alleged suicide note was found and counsel for the defendant made a motion for a new trial upon the grounds of newly discovered evidence. This motion was granted in the Superior Court and the defendant was again brought to trial upon a charge of first degree murder. The jury again convicted him and he again appealed to the Supreme Court (228 N. C. 595). The Supreme Court again affirmed this conviction, but before the date set for his execution, his sentence was commuted to life imprisonment by the Governor.

State v. Wall C. Ewing, 227 N. C. 535

The defendant here was tried on an indictment charging him with the murder of his wife. The verdict of the jury was that of guilty of manslaughter, and the defendant was sentenced to prison for a term of not less than 18 nor more than 20 years. On account of the prominence of the parties concerned, state-wide interest was attracted to the trial.

On appeal the defendant relied solely upon his motions to nonsuit for insufficiency of the evidence to be submitted to the jury. The Supreme Court sustained the action of the lower Court in overruling these motions.

State v. Blanton, 227 N. C. 517

This case was known in the State as the "divorce racket" case. It appeared from the evidence that the defendant, Ward Blanton, conceived the idea of finding persons in the State of South Carolina who desired divorces and having them come to the County of Mecklenburg, in North Carolina, and obtain divorces in the Superior Court of that County. It should be stated that divorces are not granted in the State of South Carolina. It further appeared from the evidence that the procuring of these divorces was handled according to a plan or pattern which was followed in each case. The defendant, Blanton, made it his business to seek out persons in South Carolina who desired divorces and arrange to have them come to Charlotte, North Carolina, where the complaints were prepared, usually by the defendant, Vivian Baird. These persons were then provided with an address in Charlotte and were given various instructions about their cases, including the matter of residence. These plaintiffs, seeking divorces, all came to the same office and were charged varying sums from \$100.00 to \$150.00 or more per case. The cases were tried in Court by W. T. Shore, a practicing attorney and a defendant in this case. Many exhibits were introduced into evidence showing the number of divorce cases tried and the residence of the persons obtaining these divorces. The defendants, Blanton, Baird and Shore, were convicted of a conspiracy to procure persons to commit wilful and corrupt perjury before the Courts of the State of North Carolina or, in other words, the crime of subornation of perjury.

State v. G. D. Gardner, 226 N. C. 311

State v. G. D. Gardner, 227 N. C. 37

The defendant, Doctor G. D. Gardner, was indicted in the Superior Court of Buncombe County for manslaughter in connection with the death of Mrs. Lois E. Cordell. Doctor Gardner lived in Asheville for thirty-

seven years and had been convicted of violations of the narcotic laws. His license had been revoked sometime during the year of 1939. The deceased, Lois Cordell, was twenty-three years of age and lived in an apartment in Asheville, her husband at the time of her death being in the Army. On October 23, 1945, a funeral home at Asheville went to Doctor Gardner's home, where the body of the deceased, Lois Cordell, was on the bed. The body was taken to the funeral home and was examined by the coroner and various physicians. The substance of the expert testimony was to the effect that an examination revealed that an abortion had been performed and that this operation severed the arteries or veins in the uterus, there being a large, jagged wound in the uterine wall; and the nature of the wound was such that the deceased could not have lived more than fifteen to thirty minutes. Doctor Gardner admitted that the deceased was at his home and died between 1:15 and 1:30 o'clock and that he called the coroner about 2:00 or 3:00 o'clock that afternoon. He insisted, however, that the deceased came to his home in the condition in which she was found and that he had not performed any operation. The jury convicted the defendant of manslaughter; and on appeal to the Supreme Court, he was awarded a new trial on the improper admission of evidence. The case was tried again in Buncombe County on virtually the same evidence except the State, on the second trial, was able to prove that before the body of the deceased, Lois Cordell, was found at the home of Doctor Gardner, he had been to a repair shop and requested the men at the repair shop to repair a set of forceps or a curette; and upon being told that they could not, at that time, make the necessary repairs, Doctor Gardner ran a wire through the forceps or curette, twisted the wire and cut off the ends, leaving the instrument in such shape that it could have made the jagged wounds found on the body of the deceased. The jury again convicted the defendant of manslaughter, and this conviction was affirmed by the Supreme Court.

State v. Brooks, Brown & Munn, 228 N. C. 68

The defendants were all prisoners serving sentences under the supervision of the State Highway and Public Works Commission and were working in a Prison Camp in Henderson County. The evidence shows that these three defendants planned to escape and that it was a part of their plan to overpower a guard and obtain his rifle in order to effectuate the escape. On March 3, 1947, the defendants decided to carry out their plan of escape, and the prisoners were ordered to leave the quarry preparatory to setting off a charge of dynamite. The defendant, Brown, entered a guardshack, followed by Brooks and Munn. The guard was overpowered, and his rifle was taken by Brooks; and this guard was thrown or knocked down an embankment fifteen or twenty feet from the guardshack. The defendant, Brooks, fired at this guard; and while this was going on, another guard, George Bowman, having been informed of the trouble, started towards the guardshack. The defendant, Brooks, using deceased's rifle, stuck the rifle barrel through a hole in the guardshack and shot and killed Bowman. The defendants then escaped but were later captured and made various statements about the crime. It was the contention of the defendants, Brown and Munn, that it was not within their

plan to kill Morgan and that they did not know that Brooks intended to kill Bowman. The defendants were convicted of murder in the first degree; and upon appeal, the Supreme Court held that where an unlawful combination was entered into, each was liable for the acts of the other when such acts are the natural or probably consequence of the unlawful combination even though such were not intended or contemplated as a part of the original design. The verdict of murder in the first degree was upheld by the Supreme Court.

State v. Lovelace, 228 N. C. 186

The defendant was a resident of South Carolina and lived near the North Carolina-South Carolina State line. On the day in question, he was transporting four head of slaughter-type cattle in his truck and brought them in from South Carolina into North Carolina; and upon being stopped, he stated that he was taking the cattle to the Morris Livestock Market for sale, which Market is located some little distance out of the City of Charlotte. The defendant, Lovelace, had no health certificate covering the cattle, and it was shown that the Morris Livestock Market was not a recognized slaughtering establishment. The defendant was arrested for violation of the regulations of the State Board of Agriculture relating to Bang's Disease. The defendant could have brought the cattle into the State under a health certificate as required by the regulations or he could have carried the cattle directly to a slaughtering establishment without a health certificate. The defendant challenged the constitutionality of the regulations; and upon the jury's returning a special verdict in the Superior Court of Mecklenburg County, the Court instructed the jury to find the defendant not guilty, and the State appealed to the Supreme Court. The Supreme Court held that the Bang's Disease regulations of the Department of Agriculture of the State were constitutional and valid and that the defendant was guilty of not complying with the regulations. The Supreme Court of North Carolina reversed the case and ordered the lower Court to render a verdict of guilty on the special verdict.

State v. Warren, 227 N. C. 380

The defendant, Sam Warren, and four confederates, were indicted in Pitt County on three counts:

- (1) Conspiracy to steal ten thousand pounds of sugar, valued at \$750.00, the property of Demain Foods, Inc.;
- (2) With the larceny of said sugar;
- (3) With receiving the same knowing it to have been feloniously stolen.

The defendant rested his defense on the contention that he was not in the State of North Carolina at the time of the commission of the crime and took no part in it, and that if a conspiracy was formed to commit said crime, it was formed in the State of Virginia and that he was not subject to prosecution in the State of North Carolina. Chief Justice Stacy, in writing the opinion for the court, held that there was plenary evidence

to show a conspiracy, and that it makes no difference whether it was formed in this or some other state, and that our courts have jurisdiction of a prosecution for conspiracy executed within the State, even though the conspiracy was formed out of the State.

State v. Litteral and Bell, 227 N. C. 527

The evidence in this case reveals the commission of one of the most heinous and brutal crimes ever committed in the State, and the facts are so sordid that they will not be recited here. The defendants were indicted for the kidnapping and raping of Peggy Ruth Shore, a young girl barely sixteen years of age, while she was returning to her home from a church social in the town of Elkin. The defendants had long criminal records, and the defendant Litteral offered testimony to show that he was of such low mentality that he was incapable of distinguishing right from wrong. One of the important principles of law held in this case is that the relationship of patient and physician within the purview of G. S. 85-53 does not exist between a defendant and an alienist examining him, in regard to his sanity, and that he waives any confidential relationship when he offers testimony of an alienist in support of his plea of mental irresponsibility, and the State may cross-examine such witness concerning all matters covered in the examination-in-chief. The defendants were convicted and sentenced to death. The case was carried to the United States Supreme Court, where their motion for writ of certiorari was denied.

State v. Law and Kelly, 227 N. C. 103 and 228 N. C. 443

The evidence in this case revealed that on April 15, 1946, Oscar Morrison, a police officer of the City of Winston-Salem, discovered an automobile on one of the city streets from which a five-gallon container full of non-tax-paid whiskey had been taken. He took possession of the automobile, drove it to the city lot, and parked it for the night. During the night the automobile was stolen from the city lot, and the evidence tended to show that the car was taken by the defendants. When this case first reached the Supreme Court, the defendants had been tried on a bill of indictment charging them with the larceny of an automobile, of the value of \$700.00, the property of the City of Winston-Salem. The question for decision was whether or not there was a fatal variance between the indictment and the proof. The court held that there was, in that the bill of indictment laid ownership in the City of Winston-Salem, which had no property right in it. The conviction was set aside, and the Solicitor was allowed to send a new bill to the Grand Jury.

The second trial revealed substantially the same evidence as the first trial, but the bill of indictment laid title in Oscar Morrison. The defendants again contended that there was fatal variance between the indictment and the proof. The Supreme Court held that there was not a fatal variance, since the car was in the possession of Oscar Morrison, the seizing officer, who was entitled to hold the automobile and to approve bond for its return, and therefore, had a special interest therein.

State v. Anderson, 228 N. C. 720

The defendant was tried on a bill of indictment charging him with four capital felonies, namely:

- (1) The willful and malicious burning of the dwelling house of Willie Belle Cratch;
- (2) The murder of Willie Belle Cratch;
- (3) The murder of Bobbie Eugene Cratch; and
- (4) The murder of Jessie Cratch.

The evidence tended to show that the defendant set fire to the dwelling house, while occupied by Willie Belle Cratch and the other deceased persons, who were burned to death from said fire. The defendant rested his defense largely on an attack on the organization of the court. The court held that an erroneous date in the concluding paragraph of the commission to an emergency judge to hold a term of court will not invalidate the commission when it appears to be a clerical error. The court also held that the failure of the trial judge to sign the order for Special Venire does not alone invalidate a Special Venire when ordered and summonsed and in all other respects in conformity with the statute. The Supreme Court upheld the lower court in the death sentence imposed upon the defendant.

State v. Baker, 229 N. C. 73

The case of *State v. Richard C. Baker* involved an appeal by the defendant, a licensed osteopath of Rockingham, North Carolina, from a conviction under an indictment that he had practiced medicine without a license by administering and prescribing drugs in the treatment of ailments of patients contrary to the Medical Practice Act, G. S. 90-18. The State's evidence indicated that the defendant used a printed professional card designating himself as a "physician and surgeon"; that for compensation he examined patients, diagnosed their ailments, and in the instances referred to orally recommended the use by them of various medicines either directly to the patient or by telling them to call at the drugstore for a bottle of medicine which he would by telephone request the druggist to deliver to the patients. In some instances the defendant gave his patients liver extract hypodermics and he administered one hypodermic injections of alcohol for hemorrhoids. There was no evidence that defendant had issued a written prescription to his patients.

Defendant offered no evidence and the court instructed the jury that if they believed all the evidence beyond a reasonable doubt they should return a verdict of guilty, but otherwise they should find the defendant not guilty. The jury returned a verdict of guilty. Finding no error in the lower court, the Supreme Court, in an opinion by Mr. Justice Irvin, held with respect to the several contentions of the defendant, as follows:

- (1) That the bill of indictment was not defective in failing to specify occasions on which and the patients for whom the defendant prescribed drugs
- (2) That osteopathy is a system of healing without the use of medicine, drugs or surgery.

(3) That the statutory definition of osteopathy "as a science of healing without the use of drugs" is not enlarged by the word in the statutes "as taught by the various colleges of osteopathy" and an osteopath is not permitted to use or prescribe drugs for treating human ailments.

(4) That "drugs" within the meaning of the statute defining osteopathy is any substance used as a medicine or in the composition of medicines for internal or external use irrespective of whether it contains poisonous ingredients or is purchaseable without a physician's prescription, and the definition includes patent and proprietary remedies and hypodermic injections.

(5) The giving of any directions oral or written to a patient for the use or application of drugs for the cure of any body disease is "prescribing" drugs.

(6) That while the accused cannot be convicted for doing as an osteopath what he might have a legal right to do as a private citizen in suggesting to friends the advisability of taking some medicine, the evidence tends to show that the accused "held himself out as an expert in medical affairs and in determining the proper remedies for ailments diagnosed by himself on the examining of his patients," and gave oral directions for the use of medicine for compensation, which constituted the practice of medicine, rather than osteopathy.

The Attorney General wishes to acknowledge with thanks the able assistance of the firm of Smith, Leach and Anderson, Attorneys of Raleigh, North Carolina, who, as counsel for the State Board of Medical Examiners, assisted this office in the case.

OTHER CRIMINAL CASES

During the biennium, this office has prepared briefs in and argued an unprecedented number of criminal appeals as will be seen from the statistical data which appears earlier in this report.

More than 150 cases involving more than 200 defendants were disposed of. The crimes include such major offenses as abortion, assault with intent to commit rape, bigamy, burglary, breaking and entering, carnal knowledge, embezzlement, highway robbery, larceny and receiving, murder in the first and second degree, manslaughter, and perjury. Also included are comparatively minor offenses such as assaults of all kinds, disorderly conduct, false pretenses, gambling, and violations of the Motor Vehicle and Prohibition Laws. These appeals also include one each on charges of circulating derogatory remarks about a political candidate, illegal practice of medicine, and stream pollution.

Attention is invited to the list of cases appearing in a preceding portion of this report. Space does not permit the giving of complete details of all of the cases, information as to which is available in the North Carolina Reports.

CIVIL CASES OF SPECIAL INTEREST

State of North Carolina v. Atlantic Coast Line Railroad Company, et al

During the period from August 1, 1944, to July 25, 1945, inclusive, the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Com-

pany and the Southern Railway Company collected intrastate passenger coach fares at 2.2 cents per mile. At this time the rate fixed by the North Carolina Utilities Commission was 1.65 cents per mile. The railroads were collecting these overcharges based upon authority of an order of the Interstate Commerce Commission. A suit was instituted to test the validity of the order of the Interstate Commerce Commission, which was appealed by the State from an adverse decision by a three-judge Federal Court to the Supreme Court of the United States. The Supreme Court of the United States reversed the action of the three-judge court and held that the order of the Interstate Commerce Commission was unauthorized and beyond the jurisdiction of that commission, as no facts had been found justifying the order.

North Carolina v. United States, 325 U. S. 507

Based upon estimates furnished by the railroad companies at the hearings before the Interstate Commerce Commission, the excess fares collected by the three railroad companies during this period were as follows:

Southern Railway Company—\$381,564.00.

Seaboard Air Line Railway Company—\$76,548.

Atlantic Coast Line Railroad Company—\$93,084.00.

These estimates were based upon the fares collected for the preceding year but, due to decreased intrastate passenger traffic during the period from August 1, 1944, to July 25, 1945, as compared with the preceding year, the estimates were in excess of the amounts probably collected. No accurate record was available.

This department, with the assistance of Honorable J. C. B. Ehringhaus, who appeared as counsel in the case that went to the Supreme Court of the United States, instituted proceedings before the North Carolina Utilities Commission to procure an order requiring the carriers to refund to the persons from whom the excess fares were collected the amount of such excess, and to enforce the statute, G. S. 116-25, which provides that if the overcharges were not claimed by the persons entitled thereto within a period of two years from the time they were due or the refund ordered, they should be paid to the University of North Carolina as an escheat.

An order was made by the commission requiring the railroads to make such refunds, from which the railroads appealed to the Superior Court of Wake County. After presenting the matter fully to the Board of Trustees of the University, an agreed settlement of the matter was made by which the carriers are to pay the following amounts to the University of North Carolina:

Southern Railway Company—\$190,782.00.

Seaboard Air Line Railway Company—\$38,274.00.

Atlantic Coast Line Railroad Company—\$46,542.00.

The agreement will provide that if the carriers are required to refund any of the amounts collected to the passengers paying the same, such amounts will be repaid by the University of North Carolina. As all passenger claims are now barred by the statute of limitations, it is not likely that any claims will be presented, most of which would be for fractions of a dollar.

Honorable J. C. B. Ehringhaus served as counsel in this matter without making any charge for his services and, thus, the funds will be paid over to the University without any expense for legal services.

Garrou Knitting Mills v. Edwin Gill, Commissioner of Revenue,
228 N. C. 764

This was a suit to recover income taxes paid under protest. Prior to March 15, 1941, plaintiff filed an income tax return for the calendar year 1940. More than three years later the Federal Bureau of Internal Revenue made a correction of income and assessed an additional tax against the plaintiff on the ground that the plaintiff had taken excessive depreciation. Plaintiff made no report to the State Department of Revenue of this Federal correction of income as required by G. S. 105-159. Thereafter the Commissioner of Revenue upon receipt of a report by the Federal Department of the change in taxpayer's return assessed additional tax against the plaintiff for the year 1940. The plaintiff paid the assessments under protest and brought suit to recover, contending that the Commissioner's power to make the assessment was barred within three years after the filing of the original return by G. S. 105-160. The defendant demurred to the complaint and the demurrer was heard at the September-October term of Burke Superior Court, Judge Gwyn presiding, when and where the demurrer was overruled and the defendant appealed to the Supreme Court. The Supreme Court reversed the lower court and held that the demurrer should have been sustained and non-suit should have been entered. The court held that the three-year period of limitation for making additional assessments under G. S. 105-160 was not strictly a statute of limitations but only applies to the administrative procedure by which taxes are assessed. The court further held that when a Federal correction of income has been made, even though made after the expiration of three years from the filing of the original return, an additional assessment may be made by the Commissioner of Revenue under the provisions of G. S. 105-159, which deals with the incident of a Federal correction as an independent situation separable in fact, as well as administrative procedure, which requires a new return under oath under all of the sanctions provided for with respect to the original return.

In re Wright, 228 N. C. 301, Rehearing 228 N. C. 584

In April, 1947, the Department of Motor Vehicles received from the South Carolina Highway Department a notice that Wilbur Anderson Wright of Tabor City, North Carolina, had been convicted in South Carolina of drunken driving. Acting on this notice the Department of Motor Vehicles revoked Wright's motor vehicle operator's license in this state. Wright instituted an action in the Superior Court of Columbus County to compel the Department of Motor Vehicles to return his driver's license to him, averring that he was not convicted of drunken driving in South Carolina but only forfeited bail in that case. The Superior Court Judge found that Wright was not guilty of drunken driving and ordered Wright's license restored. The Supreme Court affirmed this judgment. The Department of Motor Vehicles petitioned for a rehearing and the petition was allowed.

The former opinion was affirmed on the rehearing by an opinion stating that in such a case the motor vehicle operator is entitled to a trial *de novo* in this state on the question of his guilt or innocence of the offense for which he stands convicted or has forfeited bail in the courts of a sister state. The effect of these decisions is to make difficult the enforcement of certain portions of the Uniform Driver's License Act. Clarifying legislation is recommended.

General Motors Corporation v. Edwin Gill, Commissioner of Revenue
(2 Cases)

Plaintiff, a manufacturer of automobiles, who was not doing business in this state, paid under protest certain license taxes to the Department of Revenue. Plaintiff paid these license taxes so that dealers in this state handling its automobiles would not be required to pay the license taxes. In 1926 plaintiff instituted one action to recover these taxes alleging that as applied to it the section levying the tax was unconstitutional. A similar action was instituted in 1927. These cases came on for trial in the fall of 1947 and the defendant at that time interposed demurrers to the complaints. The demurrers were sustained and the actions were dismissed. The plaintiff gave notice of appeal to the Supreme Court of North Carolina. Before the appeal was perfected plaintiff accepted a refund of \$2,500.00 in full settlement of all differences between the parties. This represented less than one-eighth of the interest on the original claim, and about 5 per centum of the total amount involved.

Gill v. Louis Singer and Muriel Singer, T/A Singers' Jewelers

The defendants were non-residents of North Carolina and were operating a jewelry store in the City of Burlington. For some time the defendants had failed to file their sales tax returns and the Deputy Collector had been unable to obtain a return or payment of any tax. Upon receipt of information that the defendants were depleting their stock and were removing various items of merchandise from the State of North Carolina, suit was instituted against the defendants for an estimated tax in the amount of \$780.00 plus penalty and interest, the estimated tax due being based upon "best information available." Simultaneously with the institution of suit the plaintiff caused a warrant of attachment to issue against the defendants and all of the stock of merchandise and fixtures still remaining in the defendants' place of business were seized by the Sheriff of Alamance County under the warrant of attachment. Subsequently, a Deputy Collector of the Bureau of Internal Revenue appeared with a warrant for distraint against the property of the defendants for the non-payment of federal taxes. Said Federal Deputy Collector advised that the Federal Government had also seized property of the defendants located in Virginia and desired to sell all of the property including that property located in North Carolina and previously levied upon by the Sheriff of Alamance County under the warrant of attachment. The plaintiff thereupon agreed to release to the Federal Deputy Collector the property seized under its court further held that when a Federal correction of income has been made, warrant of attachment upon the understanding that the Deputy Collector

would hold the proceeds of the sale until plaintiff's claim could be established by a judgment and to apply the first proceeds of the sale toward the satisfaction of the state claim for taxes. Thereafter the defendants were adjudicated bankrupt by a Federal District Court in Virginia, an ancillary receiver was appointed in North Carolina and Judge Don Gilliam, sitting in the Federal District Court for the Middle District of North Carolina, signed an order which, among other things, restrained the Federal Deputy Collector from disposing of the merchandise and fixtures held by him by virtue of his warrant for distraint. This order was subsequently set aside by Federal Judge Johnson J. Hayes. The Federal Deputy Collector thereupon sold the property of the defendants and paid to the State of North Carolina from the proceeds of sale the sum of \$780.00 in satisfaction of the state's tax claim.

Judgment was taken against the defendants by default and the case was closed.

Nesbitt v. Gill, 227 N. C. 174, Affirmed 92 L. Ed. 13

The plaintiff paid under protest a tax levied under Section 115 of the Revenue Act, G. S. 105-47, upon horse and mule dealers and brought suit to recover the tax paid. The plaintiff contended that the tax was unconstitutional in that: (1) The purchase of horses and/or mules for resale is not a trade or profession within the meaning of Article V, Section 3 of the State Constitution; (2) The levy of a head tax of \$3.00 upon horses and/or mules purchased for the purpose of resale is a tax on property and is unconstitutional as violative of Article V, Section 3 of the Constitution; (3) The act does not levy a head tax on horses and/or mules raised in North Carolina and is, therefore, in contravention of Article I, Section 8, Clauses 1 and 3 of the Constitution of the United States, and; (4) The head tax levied under the act imposes an undue burden on interstate commerce.

The Superior Court of Buncombe County rendered judgment for the state. The Supreme Court, upon affirming judgment of the lower court, held: (1) The per head tax on horses and mules required to be paid by dealers purchasing such animals for resale is not a privilege tax for the right to purchase horses and mules nor an *ad valorem* tax on the animals purchased but is merely the method prescribed by statute for the determination of the amount of license tax to be paid by those engaging in the business. (2) The license tax imposed by the act on dealers purchasing horses and mules for resale applies regardless of whether the animals are raised in this state or are shipped into the state, therefore the tax is a levy on a local business and does not place a burden upon interstate commerce.

The judgment of the Supreme Court of North Carolina was affirmed by the Supreme Court of the United States in a percuriam decision October 13, 1947. L. Ed. 13.

Re Suspension of Driver's License of L. G. Squires

L. G. Squires, a resident of Alamance County, was convicted in the Alamance County Court of operating an automobile under the influence of

intoxicating liquor. He appealed to Superior Court of Alamance County. Apprehending that his driver's license might be suspended pending appeal, Squires filed in the Superior Court of Alamance County a petition asking that the Commissioner of Motor Vehicles be ordered to show cause why he should not be restrained from revoking or suspending petitioner's operator's license pending appeal. This order to show cause was later dismissed for the reason that no summons had been issued and no action was pending in which an injunction or restraining order could be issued, the Commissioner having appeared specially for the purpose of moving for dismissal. Squires thereupon instituted a civil action in which the same relief was prayed. Thereafter and before the termination of the civil action Squires appealed from an order suspending his driver's license, which order was entered by the Commissioner upon official notification of Squires' conviction in the county court. The petition in appeal asserted that Squires was not in fact guilty of operating his automobile under the influence of intoxicating liquor and also that G. S. 20-16, under which the Commissioner suspended Squires' license pending his appeal from the county court conviction, was in contravention of a number of provisions of both the State and Federal Constitutions. This appeal was heard before his Honor Leo Carr, resident judge of the tenth Judicial District, on May 8, 1948, when testimony was presented by Squires and by the state. Briefs dealing with the constitutional questions were submitted by counsel for both sides and after holding the matter under advisement Judge Carr signed a judgment dismissing the appeal.

Walter Miles, et al v. State Board of Education

On the 22nd day of February, 1946, W. M. Miles, at about 7:00 o'clock in the morning, was killed and robbed by one John Henry Gaston, who is now serving a prison sentence for this murder. The statement of Gaston indicates that the deceased was known to carry large sums of money around with him. According to Gaston, he and a friend of his, known only as "Baby Boy," discussed and planned to rob the deceased on the night before he was killed. Gaston's story, from his confession, is that he arose early on the morning of the 22nd of February to carry out the plan with his friend; but upon arriving at the scene of the killing, he found the deceased dead and his money gone.

The deceased was a janitor and worked full time in such capacity for the State Board of Education at the Moore School on North Regan Street in Greensboro, North Carolina, at the time of his death. The deceased had apparently come to work early on the morning of the 22nd of February to fire the furnace in preparation for the school day; and while he was apparently firing the furnace, he was knocked in the head with a hammer and died shortly thereafter without regaining consciousness.

Under the above state of facts, the next of kin of the deceased instituted an action before the Industrial Commission on the theory that the deceased came to his death as the result of an accident arising out of and in the course of his employment. The State Board of Education denied liability on the ground that, even though the accident occurred during the course of, it did not arise out of his employment, because there was no causal

relation between the accident and the employment. This position was sustained before the Trial Commissioner and was affirmed upon the claimant's appeal to the full Commission. The claimant did not appeal his case to the Court.

University of North Carolina v. Unknown Heirs of Donald M. Steffee

Action filed by University of North Carolina in September, 1947, in Superior Court, Moore County, to recover for the University of North Carolina, as an escheat, a house and lot in Pinebluff, Moore County, North Carolina. Judgment secured and property sold by the University of North Carolina for \$1,575.00 and money put in escheats fund.

University of North Carolina v. E. O. Guerrant, Trustee of the American Island Mission, or Any Successors, and J. I. Hickman

Action filed by University of North Carolina in February, 1948, in Superior Court, Caldwell County, to recover for the University of North Carolina, as an escheat, a certain tract of land containing about 50 acres in Caldwell County. Judgment secured and recovered for University of North Carolina \$1,350.00 from sale of property.

University of North Carolina v. Unknown Heirs of Joseph Futch

Action filed by University of North Carolina in February, 1948, in Superior Court, New Hanover County, to recover for University of North Carolina a tract of land of about five acres divided in lots. Judgment secured and lots recovered for University of North Carolina.

University of North Carolina v. Raymond Marshall

The administrator of the Estate of Julia Scott, deceased, filed in the Superior Court of Onslow County for the purpose of recovering, as an escheat for the University, an estate of approximately \$75,000.00 of real and personal property. Judgment was obtained for the University in April, 1946, before Resident Judge Henry L. Stevens, declaring all of said estate, after payment of all debts, costs of administration, taxes, etc., to be an escheat, and on July 9, 1946, there was recovered for the University, as an escheat, the net sum of \$75,995.81.

OPINIONS TO GOVERNOR'S OFFICE

NOTARIES PUBLIC; ELIGIBILITY FOR APPOINTMENT; APPOINTMENT MADE TO
COUNTY OF RESIDENCE; POWERS MAY BE EXERCISED IN ANY COUNTY

19 August 1946

Reference is made to the letter of Messrs. Covington and Lobdell, Attorneys at Law of Charlotte, North Carolina. In this letter it is stated that on August 1 a commission as notary public was issued to Miss Colleen E. Widenhouse for Cabarrus County. Cabarrus County appeared on Miss Widenhouse's application form as the county of her residence.

Miss Widenhouse is a stenographer of the law firm of Covington and Lobdell, and she has requested that she receive a commission as notary public for Mecklenburg County. It is stated that the performance of her duties as notary public will be exercised practically 100 per cent in Mecklenburg County, and her employers feel that it will be more satisfactory if her commission could be issued from Mecklenburg County so that any one interested could verify her commission by the records in the office of the Clerk of the Superior Court of Mecklenburg County. Messrs. Covington and Lobdell request that the commission be changed to read Mecklenburg County instead of Cabarrus County.

You inquire of this office as to what county this commission should be issued.

On September 10, 1943, this office ruled that the office of a notary public is a public office within the meaning of Article XIV, Section 7 of the State Constitution. Since this position is a public office, the eligibility requirements as to residence are the same as those required for any other public office; and the constitutional requirements as to residence are the same for the office of notary public and are set forth by reference to the articles and sections in the ruling of September 10, 1943, copy of which is enclosed.

We are of the opinion, therefore, that all commissions to notaries public issued by your office should be issued for the county of which the applicant is a resident. It is the residence of the applicant in this county which originally gives the applicant the right to request such an appointment, and it is the county of residence of the applicant which gives validity to the appointment. The issuance of a commission as a notary public to Miss Widenhouse for Cabarrus County will in nowise affect the legality of her acts as a notary public in Mecklenburg County because it is provided by Section 10-6 of the General Statutes that notaries public have full power to perform the function of their office in any and all counties of the State. For the purpose of verifying her appointment as a notary public, I think that Miss Widenhouse could get a certified copy of her record of qualification in Cabarrus County and have the same recorded in the office of the Clerk of the Superior Court of Mecklenburg County.

BOARDS AND COMMISSIONS APPOINTED BY THE GOVERNOR;
FEES; NOTARY PUBLIC

9 July 1947

Sometime ago you orally requested an opinion from this office as to whether or not a fee of \$2.50 should be charged by you for the issuance of certain commissions to various public officials and members of boards and commissions in the State.

G. S. 147-15 is, in part, as follows:

"The secretary shall charge and collect the following fees, to be paid by the person for whom the services are rendered, namely: For the commission of a judge, solicitor, senator in Congress, representative in Congress, notary public, or a place of profit, \$2.50 each; . . ."

In view of the language of this statute, it is the opinion of this office that the fee, in the amount of \$2.50, for the issuance of a commission applies only to the offices specifically named therein and to those offices which are actually "places of profit." It is not thought that the statute would apply to those boards and commissions whose only remuneration for their services is a per diem allowance fixed by the statute for attending periodic meetings of such board or commission. It would apply, however, it is thought, to membership on boards which actually provide for a salary of the members. An example of this would be membership on the Board of Barber Examiners created by Chapter 86 of the General Statutes. G. S. 86-8 provides that each member of the Board shall receive an annual salary of \$3,600.00.

In examining G. S. 147-15, some question arose here in the office as to the authority of the collection of the fee of \$5.00 by your office for the issuance of notaries public commissions. You are advised that the additional \$2.50 is authorized to be levied by you under G. S. 105-101 which is a section of the Revenue Act which authorizes a tax upon the affixation of seals.

COMPACTS WITH OTHER STATES; RIGHT OF GOVERNOR TO SIGN SUBJECT TO
LEGISLATIVE APPROVAL

14 February 1948

I received your letter of February 13 enclosing to me a photostatic copy and a typewritten copy of the proposed Regional School Agreement, as executed by nine of the Southern Governors on February 8, 1948.

You request me to examine the proposed agreement and advise you whether there is any legal or constitutional impediment which would prevent you, as Governor of North Carolina, from signing the same. You also request me to make any other pertinent comment which I may care to make about the agreement or the general principle intended to be carried out by the same.

The proposed contract provides that it shall not take effect or be binding upon any State unless and until "it shall be approved by proper legislative action of as many as six or more of the States whose governors have subscribed hereto within a period of eighteen months from the date hereof. When and if six or more States shall have given legislative approval to this compact within said eighteen months period, it shall be and become binding upon such six or more States . . ."

This is substantially the same provision as contained in the former draft of this proposed compact, which you submitted to me in your letter of February 3. In my opinion, the signing of this compact would have no binding force on North Carolina unless and until it is authorized and ratified by the General Assembly of the State. As your signature to the compact would be entirely subject to legislative approval and would amount to no more than a recommendation to the Legislature, I see no legal reason why you could not, if you saw fit, sign the tentative compact.

We have no law in this State which would authorize you to sign any contract which would in any way bind the State of North Carolina to carry out the purposes of the compact or agreement, but you do not purport to bind the State by signing this agreement and the approval of the General Assembly is provided for before it shall become obligatory.

In my letter of February 4 I referred to the provision of Article I, Section 10(3), of the Federal Constitution, which provides as follows:

"No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

In my letter I also referred to the case of *VIRGINIA v. TENNESSEE*, 148 U.S. 503, in which this clause had been construed and in which the Court indicated that a compact of this kind would not have to be approved by the Congress as it does not involve in any way the interference with political power and supremacy within its constitutional field of the Federal Government.

It might, however, be desirable to submit the compact to Congress for its approval. If this approval is obtained, I am of the opinion that it would have some influence upon a court which might later be called upon to determine any question which might be involved in the establishment of regional schools between the several States.

As stated in my letter of February 4, I believe it would be impossible to forecast the conclusion which might be reached by the Supreme Court of the United States as to the effect of such a regional school upon the constitutional rights of citizens to equal opportunity of higher education. So far as I am advised, there has been no similar compact made and no similar facility set up by any of the several States.

As requested, I am returning the photostatic copy of the compact herewith.

STATE DEPARTMENTS; AUTHORITY OF GOVERNOR TO APPOINT AND
COMMISSION SPECIAL POLICE; MERCHANTS PATROL

20 April 1948

Reference is made to the memorandum of Mrs. Alma Corbitt, Executive Clerk, dated April 16th, 1948; and reference is also made to letters of James S. Howell, dates April 1st, 1948, and April 13th, 1948.

In his first letter, Mr. Howell states that he is interested in procuring a commission as special police for Mr. C. A. Anderson. Mr. Anderson desires to institute a watchman's service similar to the merchant patrol operated by Mr. W. R. Stroupe of Charlotte, North Carolina. It is stated that Mr. Anderson has been on the Asheville police force for nine years, is an ex-serviceman, and a capable officer. It is also stated that Mr. Stroupe has shown Mr. Anderson a commission issued by the Governor, which I assume undertakes to commission Mr. Stroupe as a special officer or police under Chapter 60 of the General Statutes. In his letter of April 13th, 1948, Mr. Howell goes into further detail and states that Mr. Anderson expects to organize a set-up similar to that of Charlotte concerning patrol, checking of business buildings and furnishing watchmen for residential sections. It is stated that the men under Mr. Anderson would be in uniform and would have to be sworn in as special police or special deputies.

You inquire of this office if it would be proper and lawful to appoint this person for the type of service he contemplates.

The only authority that we know anything about which authorizes the Governor to appoint and commission these special policemen is contained in Section 60-83 of the General Statutes, which is as follows:

"Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water-power company or construction company or manufacturing company or motor vehicle carrier may apply to the governor to commission such persons as the corporation or company may designate to act as policemen for it. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section."

The above quoted Section was amended by Chapter 390 of the Session Laws of 1947, by inserting Railway Express Agencies among the list of companies or corporations for which the Governor may appoint special policemen and issue commissions for same.

In looking over the list of companies or corporations described and named in the statute for which the Governor may appoint special policemen, I am unable to see how the appointment of a merchant patrol or a special policeman to operate as a merchant patrol falls within the powers of this Section. The fact remains that a merchant, if he is operating in a corporate capacity, does not fall within the type of business described in this Section; and so far, the General Assembly has not seen fit to authorize the Governor to appoint officers to carry out this special type of

service. The statute likewise contemplates the appointment of a special policeman for one concern or company in such cases where it is authorized at all. It does not contemplate the appointment of a special policeman for a group of individuals or concerns.

We are of the opinion that the Governor of North Carolina does not have the authority to commission and appoint a special policeman or group of such policemen for the service contemplated and described in Mr. Howell's letters. If the matter is handled at all, it seems to us that it would have to be handled by having the county to appoint these men as deputy sheriffs or by having the city or town concerned, if such city or town has the necessary legal authority, to appoint these men special policemen. We do not think that these men can be commissioned or appointed by the Governor whose authority is limited to the corporations specifically named and described in the above quoted Section.

OPINIONS TO SECRETARY OF STATE

GRANTS; O'NEAL AND FULCHER ENTRIES NOS. 752, 753

5 September 1946

I received your letter of September 3 with reference to the above entries and the protest of the Department of Conservation and Development and the withdrawal of same as to the two small tracts of land within the inside area of Ocracoke settlement.

You request my opinion as to whether or not you are prevented from making the grant because of the provisions of G. S. 146-27, which requires that all entries on land shall in any event be paid for within one year from the date of entry unless a protest be filed to the entry, in which event they shall be paid for within twelve months after the final judgment on the protest.

It is my understanding that the protest to the grant is made by the Department of Conservation and Development under the provisions of G. S. 146-50, which provides that the Secretary of State shall withhold a grant to any and all vacant and unappropriated lands lying within or immediately adjacent to the boundaries of any and all national forest purchase areas, also to lands within or near State forest parks and such other areas as the Department of Conservation and Development may request to be withheld for dedication to public use, as State forests, State parks, game refuges and other recreational areas.

This, while not a protest in the exact sense used in G. S. 146-26, is in substance an objection to the issuance of a grant authorized by statute and, in my opinion, the provisions of G. S. 146-27 would permit the grant to be issued after this protest is withdrawn, although the grant was made more than one year prior to that time, and that the time the matter was held up while the protest was pending would not be counted.

CORPORATIONS; FOREIGN CORPORATIONS; RIGHT TO DO BUSINESS IN THIS STATE; POWER TO PURCHASE REAL PROPERTY

5 December 1946

I am in receipt of the letter from the Commercial Counselor of the Chinese Embassy, dated November 20, 1946, forwarded to me for reply.

This letter asks if corporations properly organized under the laws of the National Government of China are entitled to do business and establish offices or branches within the State of North Carolina.

I refer you to Sections 55-117 through 55-120 of the General Statutes of North Carolina. These statutes enumerate the powers of a foreign corporation doing business in North Carolina and give the requisites for permission to do business in this State. See, also, *BARCELLO v. HAPGOOD*, 118-712, 24 S. E. 124.

This letter also inquires if foreign corporations permitted to do business in this State are entitled to purchase real property for carrying out their business here.

This power is specifically granted in Section 55-117 of the General Statutes of North Carolina. There are no limitations, in my opinion, regarding the size and location of such holdings.

I am enclosing a copy of this opinion for forwarding to the Chinese Embassy at Washington. I return the letter from the Commercial Counselor.

TRADE-MARKS; EFFECT OF LANHAM TRADE-MARK BILL ON EXISTING
LEGISLATION RELATIVE TO TRADE-MARKS

22 February 1947

I have your letter of February 14, 1947, in which you ask my advice with reference to the questions contained in a letter, which is enclosed herewith, addressed to you from Trade-Mark Service Corporation, concerning the effect of the Lanham Trade-Mark Bill on existing North Carolina statutes relative to trade-marks.

The Lanham Trade-Mark Bill was enacted by Congress on July 5, 1946, and becomes effective July 5, 1947. This Act was passed pursuant to the powers of Congress to regulate inter-state commerce and provides only for the registration of trade-marks used in such commerce.

In most instances, it is to be expected that after this Act becomes effective, trade-marks will be registered under the Federal Act, but I see no reason to abandon the practice of registering trade-marks in this State under our law, since it is still in effect. Further, it is conceivable that a person might desire to use a trade-mark exclusively within this State. In that case, the provisions of the Federal Act would not be available since it applies only to interstate commerce, and the only law under which the trade-marks might be registered would be the North Carolina law.

I am enclosing a memorandum which contains excerpts from the Federal Trade-Mark Act and a statement of the purpose of this law, disclosed by the Senate committee report.

FOREIGN COOPERATIVE ASSOCIATIONS; DOMESTICATION

23 June 1947

It appears that you have received from Mr. F. L. Fuller, Jr., Attorney at Law, Durham, North Carolina, application, together with customary papers, for the domestication in this State of Challenge Cream & Butter Association, a non-profit, cooperative marketing association, organized without capital stock under the laws of the State of California. You have requested me to advise you of my opinion with respect to the question whether or not this corporation may be permitted to domesticate and do business in this State, and, if so, what fees and taxes it would be required to pay.

It seems clear that no corporation, domestic or foreign, may use either the word "mutual" or the word "cooperative" in its name unless it be a domestic corporation organized under the provisions of subchapter IV (mutual associations) or subchapter V (cooperative marketing associa-

tions) of Chapter 54 of the General Statutes. G. S. 54-112 and G. S. 54-139. But a domestic corporation organized under previously existing laws may adopt the provisions of subchapter V and become a marketing cooperative thereunder. G. S. 54-140. It will be observed that the foreign corporation now applying for domestication has neither the word "mutual" nor the word "cooperative" in its corporate name. Therefore, it is my opinion that G. S. 54-112 and G. S. 54-39 are not applicable to the present facts.

Every corporation organized under Chapter 55 of the General Statutes must end its name with "company," "corporation," "incorporated" or "inc." G. S. 55-2. However, it is my opinion that this statute is applicable only to domestic corporations created under our laws and does not impose such a requirement upon the foreign corporation in question.

G. S. 55-118 provides, in substance, that every foreign corporation before being permitted to do business in this State shall file with the Secretary of State a copy of its charter and a statement of the amount of its capital stock authorized and issued, the principal office in this State, the name of the agent in charge, the character of the business, and the name and addresses of officers and directors. This statute further provides:

"And such corporation shall pay to the secretary of state, for the use of the state, forty cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than forty dollars nor more than five hundred dollars; and also a filing fee of five dollars. Provided that the tax upon shares of stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars." This statute further provides:

"Every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney-general, who shall prosecute such actions whenever it appears that this section has been violated."

There is a further provision validating domestication of foreign corporations without nominal or par value shares of stock and taxing the same as provided in the statute as though the stock had a par value of one hundred dollars (\$100.00).

There is nothing in the statute which provides any basis of taxation for the admission of a foreign corporation which does not have any capital stock. The minimum of forty dollars (\$40.00 and maximum of five hundred dollars (\$500.00) refer to maximums and minimums of foreign corporations that have capital stock, and neither the maximum or minimum could be said to apply to a foreign corporation which has no capital stock.

The authorities support the view that a corporation created by one state or by a foreign government can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the comity and consent of the latter, and subject to constitutional limitations, a state has the right entirely to prohibit foreign corporations from doing business within the state. *LUNCEFORD v. COMMERCIAL TRAVELERS*, 190 N. C. 314; C. J. S., p. 30.

A state may require a foreign corporation, as a condition of being allowed to do or continue business within the state, to comply with the state law as to capital stock requirements. See 20 C. J. S., p. 40.

To provide for the domestication of foreign cooperatives having no capital stock would require some adjustment of our taxing laws as well as the admission of such corporation in the State.

The franchise tax imposed by the state is based upon the capital stock, surplus and undivided profits of the corporation. G. S. 105-122. Manifestly, if the corporation has no capital stock, it would entirely escape franchise taxes based upon the amount of its capitalization.

A cooperative would present problems for which no answer can be found as to taxation for income tax purposes as our income tax law does not deal with the subject except to provide an exemption from income taxation of those domestic cooperatives organized under the North Carolina law. G. S. 105-138; G. S. 54-143.

As G. S. 55-118 provides a penalty of five hundred dollars (\$500.00) for every corporation failing to comply with that section, and as it would be impossible for a foreign cooperative without capital stock to comply with it, it would seem that the State has made no provision for the admitting of such foreign non-stock cooperatives. It is my opinion, therefore, that you should decline to permit the domestication of the Challenge Cream & Butter Association for reasons hereinbefore stated.

BLUE SKY LAW; STOCK OF DOMESTIC AIRLINE IS EXEMPT

13 January 1948

You inquire as to whether or not the securities of the Piedmont Aviation Company, Inc., a domestic corporation, is subject to supervision imposed by Chapter 78 of the General Statutes of North Carolina and commonly known as the "Blue Sky Law."

I understand that the Piedmont Aviation Company, Inc., is a domestic corporation with its principal office and place of business in the City of Winston-Salem, North Carolina, and is engaged in the transportation of passengers, mail, and light freight by its airlines between fixed termini along definite routes both in the State of North Carolina and other states. I am also advised that this corporation has obtained from the C.A.B. a certificate of "convenience and necessity" as provided by Section 481, Title 49 of the U.S.C.A. and that the rates for transporting passengers, mail, and light freight is subject to regulation of the C.A.B. as provided in Section 642 (b) U.S.C.A.

G. S. 78-3(d) exempts from the Security Law the securities "issued or guaranteed as to principal, interest or dividend, by a corporation domestic, or foreign, owning or operating a railroad, or any other public service utility; provided that such corporation is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer, or by any governmental, legislative or regulatory body of this State, or of the United States, or any state, territory, or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof;"

It will be observed that the securities of any public service utility whose rates are subject to regulation or supervision by a public board or any governmental regulatory body of this State or of the United States is exempt even though the issuance of its securities is not regulated. Thus, the only question left is whether or not the Piedmont Aviation Company, Inc., is a public service utility, and as to this, there seems to be little doubt but what it is a public service utility since it is engaged in the transportation of passengers, mail and light freight over a fixed route of both in this and other states.

I am, therefore, of the opinion that the securities of the Piedmont Aviation Company, Inc., a North Carolina corporation, whose stock and securities are subject to regulation by the C. A. B., a federal regulator board, are exempt from the regulatory provisions of Chapter 78 of the General Statutes.

CORPORATIONS; FOREIGN CORPORATIONS; DOING BUSINESS

17 February 1948

You have referred to me a letter from the Legal Department of Perfection Stove Company, Cleveland, Ohio, and requested my opinion on a question propounded therein. Their question is as follows:

"The Perfection Stove Company, an Ohio corporation, has traveling salesmen who solicit business from dealers in North Carolina and adjoining states. These dealers will resell to purchasers on a retail level. Orders are sent to a district office in Atlanta, Georgia, for approval. Regularly once or twice a week a carload of merchandise—household appliances—is shipped f.o.b. Charlotte from the factory located in Cleveland, Ohio, to a public warehouse in Charlotte. On the straight bill of lading the Perfection Stove Company is named as the consignee. At the time of shipment the district office is notified thereof and the quantities of each product shipped. The district office then issues shipping instructions to the warehouseman for those particular products. The instructions arrive before the goods. When the goods do arrive, the public warehouseman, as quickly as possible, stencils the crates for the particular dealer named in the shipping instructions, makes out bills of lading with the dealers named as consignees, and then immediately ships these goods by common carrier. After shipment the warehouseman sends all papers to the district office and it bills the dealers."

I note from the letter from the Stove Company that no question is presented concerning the payment of North Carolina franchise tax since the Company has been paying this tax and will continue to do so.

It is stated in the letter from the Stove Company that several cases have been decided which support the company's contention that if it carries out its plans in the manner outlined above, it will not be doing business in this State. Before I attempt to render an opinion on the question of whether the above activities constitute "doing business in this State," I should like to have a list of these cases so that I may examine them. The general rule, according to P-H, State and Local Tax Service, Vol. I, Paragraph 7525, is that such an activity amounts to doing business in this State.

A great many authorities are listed in the footnote to that section and an examination of those authorities discloses that in some cases, the companies therein concerned were represented by agents whose orders were subject to approval or rejection outside of the State. Since the opinions of this office are binding upon the officials of this State until modified or overruled by the Courts [see VALENTINE v. GILL, 223 N. C. 396, 399, 27 S. E. 2d 2 (1943)], and since the answer to the question posed by the Stove Company would be a decision on the question of certain tax liabilities, I feel that in fairness to the Stove Company and the State, I should not express any opinion until the Stove Company has had an opportunity to present to me the authorities which it has discovered bearing on the question presented by it.

CORPORATION; SELLING NAME OF; PURCHASE OF GOOD WILL
[NISSEN WAGON COMPANY]

29 April 1948

I received your letter of April 28, enclosing to me the proposed certificate of incorporation of the Nissen Wagon Company and the correspondence of Mr. Thomas P. Pruitt with reference to the incorporation of this company.

In your letter of February 17, you took the position that the new corporation could not be created having the same name as the old corporation, to wit, Nissen Wagon Company, unless the old corporation was dissolved, and that the old corporation had no right to sell its name to a new corporation.

I think your conclusion is correct. Under the provisions of G. S. 55-2(1), no name can be assumed by a new corporation which is already in use by a domestic corporation or a foreign corporation authorized to do business under the laws of this State, or a corporation which has heretofore or may hereafter sell its good will to any other person, firm or corporation and notice thereof has been or may hereafter be filed in the office of the Secretary of State of North Carolina and the filing fee of \$25.00 paid to the Secretary of State.

This section has a proviso that the purchaser of the good will of such corporation, or his or its assigns, may be permitted to use the same name or one similar thereto of the corporation whose good will it has purchased.

This statute means that a corporation which sells out its good will to someone may protect the name of the corporation from being used by someone else other than the person to whom the good will is sold, by complying with this section. This would be true even though such corporation should be dissolved. If the statute is complied with, the name could not be used by another corporation unless such other corporation had acquired the good will of that corporation.

This does not mean, however, that two corporations can use the same corporate name at the same time. As suggested by you, the only way that the new name could be given to the new corporation would be for a dissolution of the old corporation to take place. If the old corporation is dissolved, you could, without other action or formality, permit the new corporation to assume the old name.

It will be noted that the quoted part of the bill of sale contained in the letter from Mr. Pruitt to you, under date of February 14, 1948, only purports to transfer title and interest in and to the corporate name of "Nissen" or the "Nissen Wagon Company." This is somewhat confusing but the bill of sale provides that the Nissen Wagon Company may continue its corporate name, trademark or trade marks to such extent as may be necessary to dispose of the remaining inventory, stock in trade or other assets incident to completing liquidation or dissolution of the Nissen Wagon Company.

Under the statute the liquidation of the corporation could be completed by the Board of Directors of the corporation at any time within three years from the date of dissolution. G. S. 55-132.

OPINIONS TO STATE AUDITOR

LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND; ELIGIBILITY OF MEMBER WORKING FOR PRIVATE CORPORATION AS POLICE OFFICER

25 July 1946

You enclose with your letter a letter from Mr. John R. Morris, Executive Secretary of the Sheriffs' Association of North Carolina. Mr. Morris would like to know whether a police officer who is now a member of the Law Enforcement Officers' Benefit and Retirement Fund can take a position for a private corporation as police officer, to do only police work, and still retain his eligibility as a member of the fund.

The eligibility of peace officers to be members of the Law Enforcement Officers' Benefit and Retirement Fund is fixed by subsection (m) of Section 143-166 of the General Statutes, which is as follows:

"(m) Law enforcement officers in the meaning of this article shall include sheriffs, deputy sheriffs, constables, police officers, prison wardens and deputy wardens, prison camp superintendents, prison stewards, prison foremen and guards, highway patrolmen, and any citizen duly deputized as a deputy by a sheriff or other law enforcement officer in an emergency, and all other officers of this state, or of any political subdivision thereof, who are clothed with the power of arrest and whose duties are primarily in enforcing the criminal laws of the state."

You will note also that subsection (5) of Section 1, which contains the definitions as set out in the regulations and rules of the Law Enforcement Officers' Benefit and Retirement Fund, is virtually the same definition as that contained in the above quoted statute.

It seems to me that, assuming a man is a peace officer, the two decisive factors are that the officer must be clothed with the power of arrest and his duties must consist primarily in enforcing the criminal laws of the State. I do not think the fact that a man is using his powers as a peace officer in connection with working for a private corporation would affect his eligibility, but I think we must assume that he is engaged primarily in enforcing the criminal laws of the State, otherwise the corporation would not want him to be an officer and could have the same service performed by a private caretaker. I do not think that the fact that the performance of the duties of such a special officer are limited to the area or territory of the private corporation affects the matter at all. For example, the powers of a sheriff are usually limited to his county; the powers of a municipal policeman are in most cases limited to the area embraced by the city limits, in fact the jurisdiction of all peace officers is usually limited by some natural boundary. You are familiar with the fact that railroads and certain corporations have police appointed by the Governor under the provisions of Section 60-83 of the General Statutes and are generally held to be eligible for membership in this fund.

I am of the opinion, therefore, that a peace officer who is already a member of the fund would continue to be eligible and continue to hold his membership in the fund, if he accepted a position with a private corporation as a police officer or special police officer to do only police work, and I do not think the fact that he is paid by the private corporation would in anywise affect his eligibility or retention of membership.

EMERGENCY BONUS FOR 1946-1947; APPLICATION TO STATE SOLICITORS

24 February 1947

You have requested my opinion as to whether or not the provisions of the Emergency Bonus adopted by the Legislature of 1947 for the fiscal year 1946-1947 would be applicable to the salaries of our Superior Court Solicitors.

The Act provides in Section 2 that the appropriations authorized are for the specific purpose of providing an additional Emergency Bonus for public school teachers and other State employees, and shall be applied to the salaries of public school teachers and "other State employees" only as provided in the schedule which is therein set up. The schedule begins with annual salaries up to and including \$1,200.00, and the final line in the schedule—annual salaries \$2,701.00 to \$6,600.00.

The salary of the State Solicitors is fixed by G. S. 7-44, as amended by Chapter 764 of the Session Laws of 1945. The salary by the 1945 Act is \$5,000.00 and there is provided allowance for expenses of \$750.00, making a total of \$5,750.00.

This salary is within the last figure of the schedule and, in my opinion, the State Solicitors would be entitled to the sum there provided of \$270.00.

In my opinion, the term "State employees" as used in this Act was intended to be applicable to all those who work for the State, whether ordinarily termed employees or State officers or officials. By a reference to 30 CORPUS JURIS SECUNDUM, page 226, I find that the term "employee" has been construed in many cases not to apply to persons who are ordinarily referred to as officials or officers. In many other cases, the term is construed to apply to such officers or officials. The construction of the word depends upon the statute in which it is found and its meaning is to be ascertained from a consideration of the statute. As stated in C. J. S., "it is not a word of art, but it takes color from its surroundings and frequently is carefully defined by the statute where it appears. The context and the connection in which it is used must largely determine whether in a particular case the term includes a certain person . . ."

As our statute is applicable to salaries up to \$6,600.00, which are salaries paid only to those who are ordinarily thought of and called officers; that is, heads of departments or State officers elected by the people, it seems obvious to me from reading the statute itself that the legislative intent in using the term was not to confine its application to those State employees who held only clerical or minor administrative positions.

I, therefore, advise that in my opinion you should make available to the State Solicitors the Emergency Bonus for the fiscal year 1946-1947 in the amount provided by the statute.

LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND; STATUS
OF DEPUTY SHERIFF WHO DOES NOT DRAW A SALARY AND
ENGAGED WHOLLY IN OTHER WORK.

25 September 1947

You inquire of this office whether or not a person who has been deputized as a deputy sheriff but who does not draw a salary and is engaged wholly in other work is entitled to membership in the Law Enforcement Officers' Benefit and Retirement Fund.

I assume that this man is a regular deputy sheriff; and, therefore, it seems to me that he falls within the provisions of subsection (m) of Section 143-166 of the General Statutes. You will there see that certain officers are named definitely as law enforcement officers, and this category includes deputy sheriffs. The last clause in this subsection is a blanket clause including all other officers clothed with the power of arrest and whose duties are primarily in enforcing the criminal laws of the State.

It is our opinion, therefore, that a deputy sheriff is automatically included in the category of eligible officers in the Fund by virtue of the fact that he is a deputy sheriff, and that fact standing alone is sufficient.

The last clause applies only to unlisted or unnamed officers, and these unclassified officers must be engaged primarily in enforcing the criminal law. A deputy sheriff being a classified officer whose eligibility is beyond doubt, I am of the opinion that the deputy sheriff mentioned in your letter is eligible.

CONFEDERATE VETERANS; BURIAL EXPENSES; CONTRIBUTIONS BY THE STATE

14 January 1948

Over the telephone this morning you make inquiry as to whether or not there is any authority for the State Auditor to issue a voucher in the amount of \$100.00 to be applied to the payment of burial expenses of a confederate pensioner in those cases where such pensioner is an inmate of a county home.

G. S. 112-34 provides in part that whenever in any county of this State a confederate pensioner on the pension roll shall die, and such fact has been determined by the State Auditor, the State Auditor shall forward to the clerk of the superior court of the county in which such pensioner resided a State warrant in the amount of \$100.00 to be paid by the clerk of the superior court of the county in which such pensioner resided to the personal representative, or next of kin of such deceased pensioner to be applied toward the payment of the funeral expenses of such deceased pensioner.

G. S. 112-20 provides in part as follows:

"No person shall be entitled to receive the benefits of this article—
*** 2. Who is confined in an asylum or county home;***."

In view of the language of the statutes above referred to, and in view of the fact that the State contribution toward such burial expenses is authorized by G. S. 112-34, which appears in Article 2 of Chapter 112, the same Article in which G. S. 112-20 appears, it is the opinion of this office that in those cases where a confederate pensioner dies while an inmate of a county home, the State may not contribute the \$100.00 provided for such burial expenses.

OPINIONS TO STATE TREASURER

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM; DESCRIPTION OR NAME TO BE USED IN THE REGISTRATION OF BONDS PURCHASED WITH FUNDS OF SYSTEM

6 September 1946

You state that the Board of Trustees of the Local Governmental Employees' Retirement System desires to purchase certain United States Treasury bonds known as Series G bonds. These are to be registered bonds, and the question has arisen as to the proper name or descriptive terms to be used for purposes of bond registration. You have heretofore purchased some \$40,000 worth of these bonds for the Local Retirement System, and these have been registered as follows:

"Treasurer of the State of North Carolina for the account of North Carolina Local Government Employees' Retirement System (Annuity Savings Fund), Raleigh, N. C."

It now appears since you have applied to purchase the Series G bonds above mentioned that some official of the Treasury Department has raised the question as to the proper terms to use in registering these bonds and has either ruled or suggested that the terms hereinafter set forth be used for registration purposes, as follows:

"North Carolina Local Government Employees' Retirement System, Trustee of Government Contribution under Section 128-30 (3) and (4) General Statutes of North Carolina—Annuity Savings Fund."

You have asked this office to give you an opinion as to the proper terms or descriptions to be used for the registration of these bonds according to the law governing the Local Governmental Employees' Retirement System.

In giving our views on this matter, we do not attempt to construe any Federal regulations or any Federal statutes. Our opinions are based entirely upon the nature of our own State act governing the Local Retirement System.

I think it should be called to your attention that the words "North Carolina Local Governmental Employees' Retirement System," do not describe any entity or any board or body with administrative powers nor do they describe any organization vested with the right to hold property, sue and be sued, enter into contracts, or invest funds. Under the provisions of Section 128-28 of the General Statutes, as amended by the 1945 Session of the General Assembly (See 1945 Cumulative Supplement of General Statutes), the Board of Trustees of the Local Retirement System was made a body corporate under the name of "Board of Trustees of the North Carolina Local Governmental Employees' Retirement System." This body has a right to sue and be sued, has perpetual succession, and a common seal. It owns, holds and possesses all of the property of this Retirement System. The provisions of Section 128-29 of the General Statutes dealing with the management of funds makes the Board of Trustees of the System

a trustee of the several funds created and authorized by Section 128-30, as amended by the 1945 Session of the General Assembly. For the sake of clarity I quote the first paragraph of this section as follows:

"The board of trustees shall be the trustee of the several funds created by this article as provided in Section 128-30, and shall have full power to invest and reinvest such funds, subject to all the terms, conditions, limitations and restrictions imposed by the laws of North Carolina upon domestic life insurance companies in the making and disposing of their investment; and subject to like terms, conditions, limitations, and restrictions, said trustee shall have full power to hold, purchase, sell, assign transfer and dispose of any of the securities and investments in which any of the funds created herein shall have been invested, as well as the proceeds of said investments and any monies belonging to said funds."

It will thus be seen that the Board of Trustees as a trustee holds title to these funds and has the right of investment and reinvestment. The duties of the State Treasurer are confined to the duties of a custodian of the fund and to payments from the fund upon vouchers signed by two persons designated by the Board of Trustees. Any authority that the State Treasurer may exercise in the investment of these funds is derived from authority given to him by the Board of Trustees and not because of the office of State Treasurer or because the State Treasurer is the custodian of the funds. It is stated that the State Treasurer, as authorized by the Board of Trustees, desires to purchase certain bonds for the Annuity Savings Fund and certain bonds for the Pension Accumulation Fund. As provided by Section 128-30 of the General Statutes, as amended, the Annuity Savings Fund is made up of accumulated contributions deducted from the compensation of members of the System. See Subsection (1) of Section 128-30. The Pension Accumulation Fund is made up of funds contributed by employers under the Local Retirement System or in other words the cities, towns and counties and other local governmental units who become employers as defined by the Act. See Subsection (3) of Section 128-30, as amended by the 1945 Session of the General Assembly.

In view of what I have said and quoted above, I am of the opinion that if you wish to purchase bonds as an investment for the benefit of the Annuity Savings Fund under this system, the proper description, name or terms of registration of the bonds would be as follows:

"Board of Trustees of North Carolina Local Governmental Employees' Retirement System trustee of employees' contribution, under section 128-30 (1), General Statutes of North Carolina, annuity savings fund."

Likewise from what I have said above, if you desire these bonds for the benefit of the Pension Accumulation Fund of the Local Retirement System, the proper name, description and terms of registration would be as follows:

"Board of Trustees of North Carolina Local Governmental Employees' Retirement System trustee of employers' contribution, under section 128-30 (3) and (4), pension accumulation fund."

Incidentally, I understand that certain bonds have been purchased for the Teachers' and State Employees' Retirement System; and I might call your attention to the fact that what I have said above applies in a general way to the registration of the bonds of that system. See Subsections 135-6 of the General Statutes and 135-7.

It is submitted, therefore, with all due respect to the Treasury Department that so far as our State law is concerned, these bonds should be registered ordinarily as set forth above in our recommendations.

STATE BOND ISSUED JANUARY 1, 1860, FOR \$1,000; RIGHT OF STATE
TREASURER TO PAY COMPROMISE SETTLEMENT OF 1879

2 October 1946

In conference with Mr. Parker of your office, he requested my advice as to the payment of the compromise settlement of 40% on a bond of the State of North Carolina, #1100, for \$1,000.00, dated the first day of January, 1860, a photostatic copy of which was furnished me. The Land Title Bank and Trust Company, through Mr. E. D. McCauley, Securities Investment Department, has submitted this photostatic copy of this bond in a letter to you dated September 25 and requested information as to the value of the bond and the procedure necessary to collect the amount payable thereon.

In your circular letter, which is mentioned in Mr. McCauley's letter, you state that under the Compromise Act of 1879, three classes of bonds were funded, as follows:

"CLASS 1

"Bonds dated before the 20th of May, 1861, known as 'old bonds,' which the holder can easily identify by their dates. They are redeemable at 40 per cent of the principal. The last date of this class is April 1st, 1861."

Chapter 98 of the Public Laws of 1879, in Section 1, provides that when any person or persons holding and owning any bond or bonds of the State of North Carolina, issued in pursuance of any Act of Assembly, enacted at any time before the 20th day of May, 1861, exclusive of bonds issued for the construction of the North Carolina Railroad and other exclusions which are not pertinent to this matter, shall surrender and deliver such bond or bonds, with the coupons attached thereto, or registered certificate or certificates, to the Treasurer of the State, and in that case it shall be the duty of the Treasurer of the State, and he is hereby required to issue and deliver to the person surrendering such bond or bonds, certificate or certificates, a new bond or bonds of the State, due and payable thirty years from the first day of July, 1880, bearing interest from date at 4%, etc.

In Section 4 of this Act, it is provided that the new bonds shall be exchanged for the old bonds at the following rates:

"Class 1.—For the bonds issued before the twentieth day of May, 1861, forty per cent of the principal of the bond or bonds so surrendered."

Provision is made in this Act for the payment of the bonds issued in compromise of the old bonds from license taxes from professions, trades, etc., and from taxes collected from wholesale and retail dealers in spirituous, vinous and malt liquors.

In Section 11 of the Act, it is provided that the provisions of the Act for the exchange and issue of bonds shall continue in force until the first day of January, 1882.

I have been unable to find any other legislation dealing with this matter.

The bond in question matured on the first day of January, 1890, and therefore is now more than fifty-six years past due. I know of no act appropriating money from the State Treasury for the payment of this bond. Our Constitution provides in Article XIV, Section 3, that no money shall be drawn from the Treasury but in consequence of appropriations made by law. See, *WHITE v. HILL*, 125 N. C. 194, construing this section of the Constitution.

I understand that no records are available in your office to show for what purpose this particular bond was issued and so we are unable to tell whether or not it was issued for the construction of the North Carolina Railroad. The bond itself recites that it was issued under an Act authorizing the public treasurer to sell the bonds of the State "for certain purposes." It is my understanding that you have no available records in your office showing whether or not this bond is outstanding and unpaid.

Under these circumstances, it is my opinion that you would not be justified in attempting to make any compromise payment of this bond. I think that it would be advisable for you to bring the matter to the attention of the General Assembly at its next session which convenes in January, in order that they may decide whether or not, at this date, any settlement of the bond should be made and, if so, upon what basis.

OPINIONS TO STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

SCHOOLS; FAIRMONT SCHOOL DISTRICT; SUPPLEMENTAL TAXES; INDIANS;
RIGHT TO VOTE IN SUPPLEMENTAL ELECTION—PARTICIPATION IN
BENEFITS; PURPOSES FOR WHICH EXPENDITURES CAN BE MADE

23 July 1946

I received your letter of July 15, enclosing a letter to you from Mr. B. E. Littlefield, Superintendent of Fairmont City Schools, in which he asks a number of questions with reference to the special tax election for the Fairmont unit to be held in November. I will quote these questions and attempt to answer them in the order asked.

(1) "Since the Indian schools are excluded from our unit, will they be allowed to vote in the election? Will their property be taxed in the event of a favorable vote on the question of a special tax?"

I have examined Chapter 256 of the Public-Local Laws of 1939 providing for the Fairmont administrative unit. Section 5, subsection (b), provides as follows:

"(b) That this Act shall not apply to, affect or include Indians residing in said unit or any Indian school therein and no Indian voter shall be entitled to vote in the primary or general election of trustees, as therein provided."

This Act was amended by Chapter 344, Session Laws of 1945, amending Section 5 by striking out the words "said Fairmont administrative unit shall levy no taxes of any description."

Nothing is said in these Acts, exempting from taxation the property of any Indians located in this administrative unit, but inasmuch as it does provide that the Act shall not apply to, affect or include Indians residing in the unit, and as Indians are excluded from the schools, it is my opinion that it was the intention of the Act to exclude Indian property from any taxation for the operation of the schools of the Fairmont unit.

(2) "Since the negro schools are in the unit, would the tax, if voted, have to be distributed equitably to the negro schools?"

In my opinion, it will be necessary to distribute the proceeds of any tax voted in this district fairly between the white and colored schools without discrimination, but this does not necessarily mean that the money would have to be distributed upon a pro-rata basis. The distribution would only have to be on the basis of needs and fairness of the schools considered, without discrimination on account of the race of the children attending the schools.

(3) "The purpose of the levy will probably be 'TO SUPPLEMENT VARIOUS BUDGET ITEMS—Current Expense.' Will this be broad enough to cover any current expense item without excluding any particular item?"

In order to have any opinion about this question, it would be necessary to have the exact language of the resolution of the Board and the terms on which the tax is voted. I would recommend that the resolution submitting the tax follow the language of the statute, G. S. 115-361, and authorize the tax in order to operate a school of higher standard than that provided for State support in the administrative unit. If this were done, the tax could be expended for any item or items in the current expense fund.

(4) "We want the tax to be levied on the entire administrative unit as it is defined in the charter. This unit covers two whole townships and parts of two other townships. Can it be levied as described?"

The township line would have nothing to do with the levying of the tax. The boundaries of the school administrative unit and the territory in which the tax is voted, irrespective of the township line, would be controlling.

SCHOOL PUPILS MAY BE REQUIRED TO ATTEND SCHOOLS IN DISTRICT IN WHICH THEY RESIDE

6 August 1946

I acknowledge receipt of your letter enclosing a letter from Superintendent W. Henry Overman of the Gates County Schools in which he inquires as to the authority to require a pupil to attend school in the district in which he resides.

I am enclosing herewith a copy of a letter dated July 9 to Honorable Paul A. Reid, Controller, State Board of Education, on this subject which I think will answer the question of Mr. Overman. In addition to the authority outlined in my letter to Mr. Reid, I call your attention to paragraph B of Section 115-49 of the General Statutes which states:

"In all actions brought in any court against a county board of education for the purpose of compelling the board to admit any child or children who have been excluded from any school by the order of the board, the order or action of the board shall be presumed to be correct, and the burden of proof shall be on the complaining party to show to the contrary."

PURCHASE OF TEXTBOOKS; SEALED BIDS REQUIRED

3 September 1946

I received your letter of August 31, requesting my opinion as to whether or not the State Board of Education would have authority to purchase certain textbooks on the adopted list in Latin and General Science which have been rebound by the publisher and which are now offered to you at

a price below the price of the books fixed by the last contract, which has now been terminated. You refer to the fact that the purchase of these books will be to fill a serious shortage and will be limited to enough textbooks to last until the next adoption can be made.

I have today conferred with Mr. Jenkins, Director of the Division of Textbooks, and discussed this matter with him.

I believe the State Board of Education would have a right to purchase these rebound textbooks, provided they find it desirable and necessary to do so.

G. S. 115-278.6 provides for the selection of textbooks from the evaluated list prepared by the Textbook Commission and the section concludes as follows:

"The board shall then request sealed bids from the publishers of all books so selected."

G. S. 115-278.9 provides as follows:

"The board shall make all needful rules and regulations with reference to asking for bids, notifying publishers as to calls for adoption, execution and delivery of contracts, requirement of performance bonds, cancellation clauses and such other material matters as may affect the validity of the contracts. All such contracts shall be subject to the approval of the Attorney General as to its form and legality."

In view of these provisions of our statutes as amended in 1945, I think it is necessary to request sealed bids from publishers of textbooks, the purchase of which is being considered. You could request bids upon new or rebound books, or both, as the Board may find desirable under the circumstances and for the limited number needed until the next textbook adoption.

REPEAL OF SECTIONS CONTAINED IN ARTICLES 23, 24 AND 26 OF
CHAPTER 115 OF THE GENERAL STATUTES

6 September 1946

I am enclosing you herewith pages 4 and 5 of the letter to Mr. Henry W. Lewis, Assistant Director of the Institute of Government, which I wish you would substitute for the pages of the copy of this letter which I sent you sometime ago.

I regret that, after giving further consideration to the question which we discussed, I felt compelled to come to the conclusion that Articles 23, 24 and 26 of Chapter 115 of the General Statutes were reenacted only for the purpose of providing the machinery for holding supplemental elections, as authorized by the Machinery Acts of 1933, 1935, 1937 and 1939, and subsequent amendments, and that the other provisions of these articles were repealed by the provisions of the General Statutes and by the provisions of the Machinery Acts referred to.

You will observe that in Section 17 of Chapter 562 of the Public Laws of 1933, the Machinery Act of that year, it is provided at the end of that section, authorizing the levy of taxes for supplementing school funds, that the section is not to be construed as conferring additional powers to levy taxes on county boards of commissioners, boards of aldermen or other tax levying authorities, *but as a limitation on existing powers to levy taxes for the purposes mentioned in this Act and contained in other public-local or private laws.* This statement, together with the language preceding the reenactment of Articles 23, 24 and 26, compel me to reach the conclusion above stated.

In view of this situation, I would strongly recommend that the next Legislature be requested to reenact such provisions as are found in Articles 23, 24 and 26 which you would deem to be necessary for school operation, and for the establishment of other school tax levying districts. I will be glad indeed to cooperate with you in preparing such legislation as you may deem essential for this purpose.

SCHOOLS; ASSUMPTION OF DISTRICT BONDS OF COUNTY BY VOTE OF THE
PEOPLE; OBLIGATION OF COUNTY TO ASSUME BONDS LATER
ISSUED BY SPECIAL DISTRICT

6 September 1946

I received your letter of August 30, enclosing a letter from Mr. J. H. Grigg, Superintendent of Schools in Cleveland County. In this letter Mr. Grigg inquires as to whether or not the County Commissioners may assume school building bonds issued by the Elizabeth School District, proceeding under the Cleveland County Act, which were voted for the erection of an elementary school within this year, without the necessity of assuming other district bonds now outstanding in Cleveland County, in the event the County should in the pending election vote a county-wide bond issue which would assume all responsibility for the cost of erection of school buildings from this date. He states that it is not now contemplated that there will be any more district bond taxes for new projects.

It is my opinion that the Board of Commissioners of the County would have the right, under authority of the statute, to assume the bonds of the Elizabeth School District but if they did do so, they would be, in my opinion, compelled to assume the bonds of all other districts issued for the purpose of construction of school buildings necessary for the constitutional six months school term, as was held by our Court in the case of *HICKORY v. CATAWBA COUNTY*, 206 N. C. 165. See, also, *EAST SPENCER v. ROWAN COUNTY*, 212 N. C. 425, and *SCHOOL DISTRICT v. ALAMANCE COUNTY*, 211 N. C. 213.

The fact that the school bonds for Elizabeth District were issued during the current year would not, in my opinion, change the obligation of the Board of County Commissioners to assume other bonds of other districts issued in prior years, under the principles decided in these above referred to cases.

SCHOOLS; BUDGET; FUNDS ALLOCATED TO ONE ITEM NOT TRANSFERABLE
TO ANOTHER WITHOUT CONSENT OF TAX LEVING AUTHORITY

6 September 1946

I acknowledge receipt of your letter enclosing a letter from Superintendent Frank B. Aycock, Jr., of the Currituck County Schools in which he raises numerous questions as to the authority of the County Board of Education to transfer funds from one item in the school budget to another.

It seems that the school budget has been broken down into many items and specific sums have been appropriated for such items. I assume that this was done to prevent the very thing such a transfer of funds from one item to another would accomplish.

Since it is the duty of the County Board of Commissioners to determine the needs under the provisions of the budget, it seems to me that it would be in violation of the provisions in the budget to transfer funds from one item to another unless such transfer was approved by the County Board of Commissioners by proper amendment to the budget.

SCHOOLS; CLEVELAND COUNTY; SPECIAL ACT AUTHORIZING ASSUMPTION
OF ELIZABETH DISTRICT SCHOOL BONDS.

23 September 1946

I received your letter of September 20, enclosing a copy of a letter to you under date of September 19 from Mr. J. H. Grigg, Superintendent of Schools in Cleveland County, in which Mr. Grigg inquired whether or not an Act of the State Legislature would be valid to authorize the assumption by Cleveland County of the Elizabeth District Bonds which have recently been issued, for the construction of a school building which is now in the progress of erection, without having to assume the other outstanding school bonds in the county.

I know of no reason why such an Act of the Legislature, if adopted, would not be entirely sufficient for this purpose. No constitutional question arises which would prevent the county, if authorized by the General Assembly, from assuming the obligations of the Elizabeth District Bonds without assuming the other school bonds issued in the county.

SUPERINTENDENT OF PUBLIC INSTRUCTION; DUTIES

5 October 1946

The North Carolina Constitution, Article III, Section 13, provides that the duties of the State Superintendent of Public Instruction shall be such as are those prescribed by statute.

G. S. 115-28, General Statutes of North Carolina, provides in part as follows:

"1. To look after the school interests of the State, and to report biennially to the Governor at least five days previous to each regular session of the General Assembly. * * *

2. Directs Schools, Enforces and Construes School Law.—To direct the operations of the public schools and enforce the laws and regulations in relation thereto.

6. To acquaint himself with the peculiar educational wants of the several sections of the State, and to take all proper means to supply such wants, * * *.

8. To sign all requisitions on the Auditor for the payment of money out of the State Treasury for school purposes."

SCHOOLS; TITLE TO SCHOOL SITE; CAPITAL OUTLAY

31 October 1946

In your inquiry of the 30th of October, 1946, you request an opinion of this office as to whether or not a county may appropriate funds for capital outlay purposes on a school site which does not belong to the county or city unit in which the funds have been collected by tax levies.

G. S. 115-88 is as follows:

"The county board of education or the board of trustees of a city administrative unit shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the said board, and the deed for the same is properly registered and deposited with the clerk of the court. Provided, it shall be lawful for the county board of education to borrow from the State Literary or Special Building Funds for the benefit of city administrative units and to allocate the proceeds of the county school building bonds between city and county administrative unit schools in proportion to the respective needs of the city unit schools and the county unit schools at the time when such county bonds are authorized: Provided further, that the title to the site in any city administrative units so aided shall be vested in the board of trustees of the unit."

Under the language of the above statute, it is the opinion of this office that no funds could be appropriated for the erection or repair of any school building unless the site upon which it is located is owned by the board of the unit erecting same.

SCHOOL LAW; SPECIAL TAX SCHOOL DISTRICTS; CHAPTER 559, PUBLIC LAWS OF 1935

15 November 1946

Receipt is acknowledged of your letter of the 12th of November, 1946, enclosing a copy of a letter from Mr. W. Henry Overman, Superintendent of the Public Schools of Gates County, wherein he states that a movement has been started in the Sunbury School District in Gates County to have bonds issued and taxes levied within the district for the payment of the bonds in order to finance the construction of a gymnasium and lunch room. He further states that the Sunbury School District includes all of Holly Grove Township and parts of Hunters Mill, Hasletts and Gatesville Townships. He raises the question as to whether or not the levy of the

taxes for the payment of these bonds might be limited to one township, Holly Grove, instead of all of Holly Grove Township and parts of the other townships within the district.

The proposed bond issue is authorized by Chapter 559 of the Public Laws of 1935, which Act was made applicable to Gates County by the enactment of Chapter 641 of the Public-Local Laws of 1937.

In effect, the Act authorizes the county commissioners, after a favorable vote by the people of the territory concerned, to set up a new district, the boundaries of which are required to be set out in the petition for the establishment thereof and in the advertisement calling for the election by the voters of the territory concerned.

In view of the above it is the opinion of this office that if the petition contains a description only of that territory included in Holly Grove Township, and the notice of the election required by Section 3 of the Act also contains only the boundaries of the area of Holly Grove Township, taxes may be levied only in that township for the payment of the bonds proposed to be issued.

Acts similar to the one in question have been upheld as to constitutionality in the case of *FLETCHER v. COMMISSIONERS OF BUNCOMBE COUNTY* and in the case of *HENDERSON v. COMMISSIONERS OF YADKIN COUNTY*, 218 N. C., pages one and thirteen, respectively.

COMMISSIONER OF PUBLIC TRUST CONTRACTING FOR HIS OWN BENEFIT;
MEMBER, BD. TRUSTEES SELLING FIRE INSURANCE
ON SCHOOL BUILDINGS

8 January 1947

In your letter of the 4th of January, 1947, you enclose a copy of a letter from the Superintendent of the Shelby Public Schools, wherein inquiry is made if a member of the Board of Trustees of the Shelby City Administrative Unit could sell fire insurance on school buildings within the Shelby City Administrative Unit without violating the provisions of G. S. 14-234, which prohibits a director of public trust contracting for his own benefit.

The statute above referred to provides in effect that if any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may in any manner be interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, shall be guilty of a misdemeanor.

Under the language of the above statute, it is the opinion of this office that the Trustee of the Shelby City Administrative Unit to whom you refer could not sell insurance on property belonging to the Unit without subjecting himself to the penalty prescribed by this statute.

SCHOOLS; PHYSICAL EXAMINATION OF TEACHERS AND EMPLOYEES

10 January 1947

I have your letter of January 6, referring to G. S. 115-140, requiring health certificates for teachers and others employed in the public schools.

You state that in practice it has developed that teachers are given health certificates without an examination of any kind by private physicians, some county physicians and, occasionally, by health officers. You inquire as to whether or not, in my opinion, you can require examinations, including an X-ray, before accepting certificates under the present statute.

The statute does not expressly require an X-ray examination and, in the absence of such, I doubt whether you could require certificates including a chest X-ray. I think the statute clearly contemplates that the certificate should be given by a physician only after he has made an actual examination of the person who is furnished the health certificate.

If you wish to amplify the statute so as to make it necessary for the person examined to have an X-ray examination, and giving the State Superintendent of Public Instruction the right to make rules and regulations with regard to health examinations of teachers and other school personnel, I think the statute should be amended to this effect. I will be glad to confer with you at any time convenient and assist in the preparation of this amendment. I believe we should have the benefit, in the conference, of the views of Dr. Carl V. Reynolds and I suggest you invite him to the conference.

SCHOOLS; USE AND CONTROL OF SCHOOL PROPERTY

13 January 1947

I acknowledge receipt of your letter of January 10 enclosing a copy of a letter from Superintendent F. T. Johnson of the Perquimans County Schools in which he inquires as to the authority of his Board of Education to rent or allow independent basketball to be played on the high school basketball court in the Perquimans County High School building.

As to the custody, control, and use of school property, I call your attention to Section 171-36 of the Public Laws of 1923 (General Statutes 54-78) which provides:

"It shall be the duty of the County Board of Education and Board of Trustees to encourage the use of the school buildings for civic or community meetings of all kinds that may be beneficial to the patrons of the community, and the County Board of Education or Board of Trustees has authority to make rules and regulations governing the use of school property."

This section was modified by the School Machinery Act of 1939, and now appears in the North Carolina General Statutes, Section 115-95, in the following language:

"It shall be the duty of the County Board of Education as to county administrative units and the Boards of Trustees as to city administrative units, to encourage the use of school buildings for civic or community meetings of all kinds that may be beneficial to the members of the community, the State School Commission and the County Boards of Education for county administrative units and Boards of Trustees for city administrative units, shall have power and authority to promulgate rules by which school buildings may be used for other than school purposes."

The policy of the State has been to encourage the use of school buildings for various civic and community meetings, but it is apparent from the quoted sections that the State Board of Education, which has superseded the State School Commission together with the trustees of an administrative unit, has the control and custody of school buildings and property, and may promulgate rules and regulations permitting such use of school property as to them seems wise for other than school purposes.

It, therefore, seems to me that the question raised by Superintendent Johnson is subject to rules and regulations which have been or may be adopted by the County Board of Education and the State Board of Education.

COMPULSORY SCHOOL ATTENDANCE LAW

23 January 1947

Receipt is acknowledged of your letter of the 21st of January, 1947, enclosing a copy of a letter from Judge Walker of the Durham City and County Juvenile Court, with reference to the above subject.

On the 11th of January, 1947, Judge Walker requested an opinion of this office concerning the problem set out in her letter to you, and on the 14th of January, 1947, her inquiry was replied to and a copy of the same is enclosed, herewith, for your information.

As you will note we advised Judge Walker that in view of the fact that the punishment prescribed in the compulsory attendance law is aimed at parents or guardians of children who fail to attend school, and that the parent of the alleged delinquent had attempted to have her child reinstated to no avail, that she would not be amenable to this law.

It appears from Judge Walker's letter that she is convinced that the child should be reinstated, and, in this connection, your attention is invited to G. S. 115-145 which provides that a teacher in a school having no principal, or the principal of a school, shall have authority to suspend any pupil who willfully and persistently violates the rules of the school or who may be guilty of immoral or disreputable conduct, or who may be a menace to the school. It is provided here that every suspension for cause shall be reported at once to the attendance officer, who shall investigate the cause and shall deal with the offender in accordance with rules governing the attendance of children in school. It would seem that after this report has been filed that an investigation should be made to determine whether or not the child was dismissed for good cause by the principal, and a report thereof should then be made to the school trustees for their final action in the matter.

It would seem entirely proper that since Judge Walker has jurisdiction over offenders against the compulsory school attendance law that she would be justified in making such representations to the trustees of the school with respect to the matter as in her judgment would be just and proper. Final action in the matter would, of course, lie with the school authorities.

SCHOOLS; COUNTY BOARD OF EDUCATION; DE FACTO MEMBER;
PER DIEM AND TRAVEL EXPENSES

10 February 1947

I received your letter of February 7, enclosing copy of a letter from Mr. Frank B. Aycock, Jr., Superintendent of Schools in Currituck County.

As stated by Mr. Aycock, I advised Honorable Chester Morris over the telephone that, in my opinion, Mr. O. H. Bonney would be a de facto member of the Board of Education of the County and that, as such, the action of the Board of Education with him as a member would be valid until there had been an official declaration of a vacancy on the Board by action of the Board or otherwise. I believe that as a member attending a meeting, he would be entitled to his per diem and travel from the place from which he is appointed; that is, from Knotts Island.

Mr. Bonney having moved out of the State, it would seem to be proper for him to tender his resignation, in the absence of which the Board of Education could declare a vacancy by reason of his change of residence, so that his successor might be appointed.

SCHOOL LAW; LOCAL TAX DISTRICTS FROM PORTIONS OF
CONTIGUOUS COUNTIES

29 March 1947

In your letter of the 25th of March, 1947, you enclose a letter wherein inquiry is made if, where a school district has been set up by the State Board of Education which includes sections of other counties than the one in which the school is located, the Board of Education of the county in which the school is located has authority to appoint local board members for the school in question from the sections of the counties which are included in the particular school district.

This question is answered by Subsection c of Section 115-197 of the General Statutes which provides that the school committee shall consist of five members, three of whom shall be appointed by the Board of Education of the county in which the building is to be situated and two to be appointed by the other county or counties.

In view of the language of this section it is the opinion of this office that the County Board of Education in which the school is located has authority to appoint only three of the board members. The appointing authority for the other two lies with the Board of Education in the other county concerned.

Replying to the second inquiry you are advised that this section has no application whatsoever to townships within a county where the school districts overlap township boundaries.

DOUBLE OFFICE HOLDING; COUNTY SUPERINTENDENT OF PUBLIC
INSTRUCTION; COUNTY ACCOUNTANT

12 June 1947

Replying to your letter of the 10th of June, 1947, you are advised that this office has on numerous occasions held that the office of superintendent of public instruction and that of county accountant are both offices within

the meaning of Article XIV, Section 7 of the Constitution, which prohibits double office holding, and that one person may not hold both these offices at the same time.

Our Supreme Court has held that a public officer who accepts another public office *ipso facto* vacates the former.

SCHOOLS; TRANSFER OF FUNDS DERIVED FROM FINES; FORFEITURES, ETC.;
APPROVAL OF STATE BOARD OF EDUCATION REQUIRED

25 June 1947

I have your letter of June 24, enclosing a letter to you from Mr. L. E. Mercer, member of the Board of School Trustees of the Washington City Administrative Unit, in which Mr. Mercer asks whether or not the approval of the State Board of Education is required for the transfer of a surplus in the current expense fund derived, for the most part, from fines and forfeitures, to the capital outlay fund to provide additional play ground space at the John H. Small school unit and for additional temporary class rooms.

G. S. 115-356 provides that the expenditures designated as "Maintenance of Plant and Fixed Charges" shall be supplied from funds required by law to be placed to the credit of the public school fund of the county derived from fines, forfeitures, penalties, dog taxes and poll taxes, and from all other sources except State funds; provided, that when necessity shall be shown and upon approval of the county board of education or trustees of any city administrative unit, the State Board of Education may approve the use of such funds in any administrative unit to supplement any object or item of the current expense budget, including the supplementing of the teaching of vocational subjects.

G. S. 115-363 requires that all local budgets be approved by the State Board of Education.

In view of these provisions, I believe it is necessary for the State Board of Education to approve the proposed transfer of funds. It may be doubted whether or not the statute, G. S. 115-356, permits the transfer of fines, forfeitures, etc., for a purpose other than current expense. Any question about this could be removed by the Board of County Commissioners leaving the surplus in this fund as a credit against taxes which would be levied for next year for current expense and appropriating capital outlay funds in an equivalent amount, to be provided by tax levy. This could be done without increasing the tax levy and without any possible conflict with the statute.

SCHOOLS; TUITION OF OUT-OF-SPECIAL-TAX DISTRICT PUPILS; CREDIT FOR
PROPERTY TAXES; WHAT PROPERTY INCLUDED

30 June 1947

I received your letter of June 26, enclosing copy of a letter dated June 21, 1947, from Mr. J. W. Byers, Superintendent of Asheville City Schools, in which he writes as follows:

"The Asheville City School Board is planning to charge tuition to out-of-district students. One question has been raised, and I am cer-

tain others will follow as to credit on tuition for non-residents of the district owning property within the district. I would appreciate your giving me an official ruling on the application of 115-214 to non-residents having a business in the district in the form of a partnership, corporation or any type organization other than sole ownership."

He also submits additional questions in his letter of June 24 as to whether a credit of non-district resident who owns property within the district should be given for the supplementary levy and district debt service or supplementary levy alone. He mentions that in Asheville last year the supplementary levy was .2118 and the debt service levy was .1682, making a total of .38. He also wishes to know whether the credit should be recognized before the tax is actually paid to the tax collector.

The ownership of shares of stock in a corporation would not entitle the owner of such stock to a credit for taxes paid by the corporation against the tuition charges, as the corporation is an entirely separate and distinct entity. It is my opinion also that the parent or person in *loco parentis* having an interest in property belonging to a partnership would not be entitled to offset taxes paid or charged against the partnership against the tuition charged by the school. The partnership is primarily liable for the taxes and not the individual members of the partnership, and it would often be difficult, if not impossible, to ascertain the ultimate interest of a partner in partnership assets.

If the parent or person in *loco parentis* holds title to property as a tenant in common with one or more persons, the taxes paid on this property, if listed in the individual name of the tenant in common who is a parent or person standing in *loco parentis* to the extent of the interest of such person in such property, might be offset against tuition charges. If the property is listed for taxation by the tenants in common together, I do not think the school would have to ascertain and separate the respective interests of the common tenants in order to determine the amount of tax credit which might be claimed.

In answer to other questions submitted by Mr. Byers, I would say that in my opinion the taxes paid for a supplementary levy and debt service levy would be special school taxes paid in the school district, and that credit should be allowed for both against the tuition charged. I think the credit should be allowed whether or not the tax has actually been paid, as it is a lien upon the property of the taxpayer.

SCHOOLS; BEER AND WINE; ADDITIONAL TAXES UNDER H. B. 1051; USE OF
FUNDS BY COUNTIES; SALE OF BUILDING LOCATED ON LAND
NOT OWNED BY BOARD

15 July 1947

In your letter of the 14th of July, 1947, you enclose a copy of a letter from Mr. J. H. Grigg, Superintendent of Schools in Cleveland County, wherein he request an opinion from this office as to whether a part or all of the beer taxes collected in the County may be used to employ teachers above the number allotted by the State Board of Education.

The answer to Mr. Griggs inquiry is found in Section 11 of the Committee Substitute for H. B. 1051. This section reads as follows:

"The funds allocated to counties and/or municipalities under this Act may be used by said counties or municipalities as any other general or surplus funds of said unit may be used."

In view of the language of the above quoted section, it would appear that the funds allocated to a county under Committee Substitute for H. B. 1051 may be used in any way that either general or special county funds may be used. It would appear, therefore, that such tax may be lawfully used to employ teachers above the number allotted to the county by the State Board of Education.

Mr. Grigg further makes inquiry as to whether or not a school site which has been deeded to the County Board of Education with the provision that when the site ceases to be used for school purposes, it automatically reverts ownership to the original heirs, if the County Board of Education may remove school buildings from such sites, or does the title to the buildings revert to the original owner.

The answer to this last question depends entirely upon the condition under which the building was constructed. If there was no mention in the original deed of the Board's right to remove the building or otherwise dispose of it at the time it was erected upon the land of a third party, it is not thought that the Board may dispose of it in the absence of the consent of the owners of the land.

SCHOOL LAW; TRANSPORTATION OF CHILDREN TO ATHLETIC EVENTS;
LIABILITY OF COUNTY BOARD OF EDUCATION OR LOCAL SCHOOL
COMMITTEE FOR INJURIES TO STUDENTS BEING TRANSPORTED
TO ATHLETIC EVENTS

15 July 1947

In your letter of the 14th of July, 1947, you enclose a copy of a letter from Mr. Sloane W. Payne, Superintendent of Schools in Alexander County, along with a Certificate of Incorporation of the Taylorsville High School Athletic Association, Inc. Mr. Payne inquiries if there is any liability on the part of the County Board of Education and the Taylorsville School Committee for injuries or death of school children while being transported to and from athletic events in a bus owned and operated by the corporation known as the Taylorsville Athletic Association.

Under the circumstances outlined above, it is not thought that there would be any liability on the part of the County Board of Education of Alexander County or the Taylorsville School Committee for injuries or death of school children while being transported to and from athletic events in a bus owned by the Taylorsville Athletic Association, Inc.

SCHOOLS; TEACHERS; TERMINATION OF CONTRACT

23 July 1947

I acknowledge receipt of your letter enclosing a letter from Superintendent Overman of the Halifax County Schools in which he states that a teacher in one of his schools has signed the notice of acceptance for

teaching during the 1947-48 school term and that no notice was sent to her of the termination of her contract prior to the close of the past school term. He further states that the teacher does not hold a certificate and that no written contract has been signed.

You inquire as to whether or not this teacher may now be replaced by a teacher who holds a teacher's certificate for the next school term.

I gather from Superintendent Overman's letter that this teacher has been teaching for some time in the Halifax County Schools and that she was furnished with and signed the notice of acceptance to teach during the coming year. He does not state why a written contract has not been heretofore signed, and I am wondering if a former contract was not entered into when the teacher first began to teach. If such contract was not entered into, then the school officials were without authority to use State funds to pay her salary, as the statute requires every teacher to enter into a written contract before she is entitled to receive her salary. I am wondering if, under all the circumstances, the signing and acceptance of the notice to teach during the coming year does not constitute such a contract to teach during the coming year does not constitute such a contract as would be binding, and since the notice of termination was not sent to the teacher prior to the close of the past school year, she may not now be replaced. Before expressing a definite opinion on this case, I would like to discuss the matter with you and obtain additional facts as to circumstances under which this party has been teaching without first having entered into a formal contract.

FINES, FORFEITURES, AND PENALTIES; PENALTIES COLLECTED FOR VIOLATION
OF TRAFFIC LAWS; RIGHT OF SCHOOL FUNDS TO RECEIVE SAME

30 July 1947

I received your letter of July 28 which you write me as follows:

"Superintendent M. C. Campbell of Catawba County and a number of other superintendents have made inquiry of me as to whether the penalty collected from those who violate the time limit at parking meters should be covered into the public school fund. As you know, a substantial sum of money is collected over the state each year from this source and it seems to me that such penalties would be required by the Constitution to become a part of the public school fund in the same manner as other fines, forfeitures, penalties, etc. I shall appreciate having your opinion on this question at your earliest convenience."

Some difficulty is experienced in answering your letter on account of the lack of definite knowledge as to the fines or penalties collected, to which your letter refers. By way of explanation, I understand that many municipalities in the State have adopted ordinances which provide in substance that any person who is notified of the violation of parking ordinances, and other minor motor vehicle laws prescribed by municipal ordinances, may pay to the Town official designated a small sum, usually one dollar (\$1.00), and that if said payment is made, no criminal warrant or charge is made against the offender. If the payment is not made, the City officials are required to swear out a warrant, charging the criminal offense of violation of a city ordinance,

There is no General Statute in the State which directly authorizes municipalities to adopt such an ordinance or sanction this method of procedure. There are some Private Acts authorizing some cities to set up traffic courts and follow somewhat this character of procedure.

It is difficult to find the proper name for the character of exaction which is made in such instances, but it is not difficult, to determine whether or not it is a fine, penalty, or forfeiture within the meaning of the constitutional provision found in Article 9, Section 5.

In the case of *BOARD OF EDUCATION v. HENDERSON*, 126 N. C. 689, it was held that all fines *for violation of the criminal laws of the State* go for the establishing and maintaining of free public schools in the several counties, whether the fines are for the violation of Town ordinances, made misdemeanors by statute, or other criminal statutes.

It is clear, therefore, that in the event a warrant was actually sworn out for violating a parking ordinance and a criminal offense charged, any fine paid upon conviction would go to the school fund.

The Constitution, Article 9, Section 5, provides: "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the panel or military laws of the State . . . shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the State. . . ."

The amount paid, as required by a town ordinance, by the person for the violation of the parking and other minor motor vehicle laws and regulations is a sum paid by the offender to avoid a criminal charge being preferred against him and could not be said to be a fine collected for the breach of the panel or military laws of the State.

In the case of *BOARD OF EDUCATION v. HENDERSON*, 126 N. C. 689, our Supreme Court held that the fines imposed in a criminal prosecution for violation of a city ordinance belonged, under the constitutional provision, to the school fund. In this connection, the Court said:

"This is not so with regard to 'penalties' which the defendant may have sued for and collected out of offenders violating its ordinances. These are not penalties collected for the *violation of a law of the State* (italicized by Court), but of a town ordinance."

Under this decision, therefore, it is my opinion that penalties imposed by town ordinances, and voluntarily paid by the persons charged with the violation of the parking and other motor vehicle ordinances, would not become a part of the school fund of the County but may be properly retained by the municipality by which they are collected.

SCHOOLS; CLEVELAND COUNTY ACT; RIGHT TO REQUIRE COUNTIES TO
ASSUME BONDS ISSUED THEREUNDER

30 July 1947

I received your letter of July 26, in which you write me as follows:

"The General Assembly of 1933 and subsequent sessions has enacted laws creating special districts for the issuance of school building bonds

by a vote of the people. Since Cleveland County was the first County to have such a law enacted the Acts have become to be known generally as the "Cleveland County Act."

Your opinion on the right or power of districts that have voted bonds under provisions of these Acts to bring an action to compel the County Commissioners to take over the indebtedness created by the districts will be appreciated. In all of the Acts it is very clear that the Commissioners may assume the special district indebtedness but it is not plain whether they may be compelled to do it, as was the case before 1933."

The question which you present has not been decided by the Supreme Court of this State, in the absence of which I cannot give you any conclusive answer.

If, after bonds are issued under the authority of the so-called Cleveland County Act, the county should assume the bonded indebtedness of schools of other districts in the county, it is possible that the Court would hold, under the principle of the decisions in *CITY OF HICKORY v. CATAWBA COUNTY*, 206 N. C. 165, *EAST SPENCER v. ROWAN COUNTY*, 212 N. C. 425, and other cases, that the county would be required to assume the bonds issued by the district under the Cleveland County Act for the building of school houses necessary for the constitutional six months' school term.

If, however, the county has not assumed the bonds of other school districts after the bonds were issued by the district under the Cleveland County Act, I am inclined to think that the county could not be compelled to assume such district bonds, although it may have theretofore assumed other bonds of districts in the county.

SCHOOL LAWS; PRIVATE SCHOOLS; SOLICITORS

4 August 1947

In your letter of the 29th of July, 1947, you state that many private school operators interpret Section 115-334 of the General Statutes to mean that anyone who interviews applicants for the school, releases advertising material, or talks by telephone to prospective students is soliciting business for the school and that the \$2.00 license fee provided for by the act is paid. In other cases, however, the operators contend that they do not solicit outside of the school office of a particular school and are, therefore, not liable for a solicitor's license under the act.

G. S. 115-334 is, in part, as follows:

"All persons soliciting students within the State of North Carolina for commercial colleges, business schools or correspondence schools located within or without the State of North Carolina, shall be required to secure on July first of each year an annual license from the state board of education, such license to cost two dollars (\$2.00)."

It is thought that the language of the above statute is broad enough to include the solicitation of business regardless of the fact that such solicita-

tion is carried on only in the school office. It is the opinion of this office that the license fee is required regardless of where such solicitation is carried on, whether in the school or outside.

SCHOOLS; TEACHERS' CONTRACTS; DUTY OF TEACHER TO MITIGATE DAMAGES
BY ACCEPTING ANOTHER JOB UPON BREACH OF CONTRACT; FROM WHAT
FUNDS TEACHERS PAID UPON BREACH OF CONTRACT

19 August 1947

I received your letter of August 12 enclosing copy of a letter from Mr. Frank M. Crawford, Superintendent of Schools in Jackson County, in which Mr. Crawford writes as follows:

"Last spring before schools were out, Mrs. Dana Lanning Hidgon, teacher in the Wilmot School, was advised personally by Mr. Moses, Superintendent at that time, that she would not be re-elected for the 1947-48 school term. However, she was not notified by registered letter to that effect.

"If Mrs. Hidgon is offered another teaching position in the County and she fails to accept, could she demand payment of her salary for the coming year? We should like to have a ruling on this matter from the Attorney General. We should also like to know from what funds her salary would come, should she be able to draw her salary." You request my opinion on this subject.

The general rule is that a teacher whose contract has been unlawfully broken by the school authorities is entitled to damages for a breach of contract, which damages would be the contract price for her services less such amount as the teacher could have earned by accepting similar employment which she might have found by exercise of reasonable diligence or which was offered to her. By "similar employment" is meant employment which is not of a different or inferior kind or not in an unreasonably different locality.

The letter inquires if the teacher is offered another teaching position in the County and fails to accept, could she demand payment of her salary for the coming year.

This would depend upon whether or not the locality in which she is offered the position is reasonably convenient to her and if the position which she is offered is of the same grade in which she was teaching.

In the event the teacher should find other employment either in teaching or doing something else, any amount which she would earn during the teaching months would reduce the damages which she would be entitled to recover.

The teacher who was discharged would not be entitled to draw a salary check, as she would not be certified as teaching in the school. Any payment made her would have to be provided by funds to be supplied by the County. No provision is made in the State appropriation for the payment of teachers' salaries who have been unlawfully discharged. Arrangements would have to be made through the Board of County Commissioners of the County to provide the necessary funds for the administrative unit in which the teacher was employed.

SCHOOLS; PUPILS REQUIRED TO ATTEND SCHOOL IN DISTRICT
IN WHICH THEY RESIDE

22 August 1947

I acknowledge receipt of your letter enclosing a copy of a letter from Superintendent J. W. Wilson of the Mecklenburg County Schools, in which he refers to an opinion of the Attorney General to the effect that persons temporarily residing in housing units outside of the Charlotte city limits would be entitled to vote in a municipal election.

You state that the question has arisen as to whether or not school children residing in such area should attend the school of that district or be transported to the Charlotte City Schools.

The letter written by the Attorney General deals only with the right of the persons mentioned in his letter voting in a Charlotte municipal election. As pointed out in that letter, a person may temporarily reside in another place but retain his legal residence within the voting unit from which he has moved.

I think the answer to the question is different when dealing with school children residing in a school district. This office, prior to the 1947 Session of the Legislature, had repeatedly expressed the opinion that the county boards of education and the State Board of Education has authority to assign the school to which children should attend within the district in which they reside. The 1947 Session of the Legislature, by House Bill #772, strengthened this authority by specifically saying: "School children shall attend school within the district in which they reside unless assigned elsewhere by the State Board of Education." I think the word "reside" here means the place where the child actually lives and not the place in which his parents may retain their legal residence for the purpose of voting.

I, therefore, agree with Superintendent Wilson that the children residing outside of the boundaries of the City of Charlotte School Administrative Unit should attend the school within the county district in which they reside, unless they are transferred to some other school by the State Board of Education.

SCHOOLS; SUPPLEMENTS FROM FINES, FORFEITURES, PENALTIES, ETC.;
APPROVAL BY BOARD COUNTY COMMISSIONERS

22 August 1947

I received your letter of August 16, enclosing copy of a letter from Mr. E. E. Sams, Superintendent of Schools in Lenoir County, in which he writes as follows:

"The Lenoir County Board of Education passed an order raising the salaries of all its employees paid from County funds. These raises were to be the same as that given by the State for like salaries. These raises were indicated in the July budget. All were approved by the Commissioners except one. In this case does the County Board of Education have the right to pay from funds received from fines, forfeitures, etc., this increase in salary? Please advise with the Attorney General and give me a ruling on this matter."

The School Machinery Act, G. S. 115-356, provides as follows:

"The objects of expenditure designated as maintenance of plant and fixed charges shall be supplied from funds required by law to be placed to the credit of the public school funds of the county and derived from fines, forfeitures, penalties, dog taxes, and poll taxes, and from all other sources except state funds: Provided, that when necessity shall be shown, and upon the approval of the county board of education or the trustees of any city administrative unit, the State Board of Education may approve the use of such funds in any administrative unit to supplement any object or item of the current expense budget, including the supplementing of the teaching of vocational subjects; and in such cases the tax levying authorities of the county administrative unit shall make a sufficient tax levy to provide the necessary funds for maintenance of plant, fixed charges, and capital outlay: . . ."

G. S. 115-363 provides that a request for funds to supplement State school funds, as permitted under the above conditions, shall be filed with the tax levying authorities in each county and city administrative unit on or before the 15th day of June, on forms provided by the State Board of Education. The tax levying authorities of such units may approve or disapprove this supplemental budget in whole or in part and, upon approval being given, same shall be submitted to the State Board of Education which shall have authority to approve or disapprove any object or item contained therein.

It is my opinion that under these statutes, it is necessary to secure the approval of the Board of County Commissioners, as the tax levying authority, before the fines and forfeitures, etc., could be diverted for other use than that provided by the statute above quoted.

SCHOOL LAW; COMPULSORY ATTENDANCE IN SCHOOLS

23 August 1947

Replying to your inquiry of the 21st of August, 1947, you are advised that the Compulsory School Attendance Law, as passed by the 1945 General Assembly, G. S. 115-302, does apply for the school year 1947-1948.

SCHOOLS; TEACHER CONTRACTS; TRANSFER OF TEACHER

27 August 1947

I received your letter of August 22, enclosing copy of a letter to you from Superintendent A. B. Hurt, under date of August 16, in which he refers to a letter written me sometime ago as to a teacher contract which had not been terminated, but the teacher transferred to another district school by the district committee and upon receiving the teacher allotment, due to attendance, it was found that no teacher had been assigned to this school. The question is, could the teacher demand employment in the school in which he was formerly employed or some other school in the district.

I wrote Mr. Hurt that the answer to this question would depend somewhat upon the facts in connection with the transfer of the teacher. I had in mind to inquire whether or not the teacher had voluntarily agreed to

the transfer to another school and whether, after being transferred, it was ascertained that due to teacher allotments the position was not available.

G. S. 115-359 provides that a teacher or principal must be notified by registered letter of his or her rejection prior to the close of the school term, *subject to the allotment of teachers made by the State Board of Education.*

Teacher contracts are, therefore, continued under the terms of the statute, subject to the allotment of teachers, and a teacher would have a right to continue teaching in the school in which she had made a contract to teach, unless by voluntary arrangement she had agreed to be transferred to some other school. If after being so transferred the allotment of teachers prevented her employment, she would not have a right to demand her position in the school from which she was transferred. If the transfer was without her consent, then I am inclined to think she would have a right to retain her position in the school in which she was employed to teach, if allotments for teachers for that school were adequate to include her.

AD VALOREM TAXES; PENALTIES; ALLOCATION

5 September 1948

I have your letter of August 25 in which you enclose a copy of a letter from Mr. Allen J. Bell, Superintendent of Schools in Clay County, which is as follows:

"Please advise if *any part of Tax Penalties* may be credited to any fund other than the Current Expense Fund of the Schools. It is my understanding that the net collection of Tax Penalties should be credited to this fund."

In my opinion, "penalties" assessed for the late payment of taxes is not a "penalty" within the meaning of Article IX, Section 5 of the Constitution which appropriates to the county school fund "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws within the State." The penalty charged for the late payment of taxes is not actually a penalty, but is interest, and becomes a part of the tax and is required to be prorated among the various funds in accordance with the rate levied for each.

This matter was somewhat clarified by the 1947 Session of the Legislature which enacted as Chapter 888 the following statute, now G. S. 105-345.1.

"Wherever the words 'penalty' or 'penalties' are used in any statute to designate any charge imposed by law with respect to the late payment of county or municipal ad valorem taxes, the same shall be deemed to mean and be interest, but this shall not be construed to authorize the computation and imposition of any charge different from that which would be computed and imposed if this Section had not been enacted, or if Section 105-345 had not been amended by substituting the designation 'interest' for the designation 'penalty' in several instances therein. (1947, c. 888.)"

SCHOOL LAW; PUBLIC SCHOOLS; SCHOOL COMMITTEEMAN AND TEACHER

11 September 1947

Replying to your letter of the 9th of September, 1947, you are advised that under the provisions of G. S. 115-132, no person while serving as a member of any district committee shall be eligible to be elected as a teacher of any public school; and that should such person be elected to teach in any public school or private school receiving public funds before resigning as a member of the district committee, said election is void.

The above statute is applicable to the situation outlined by you for the reason that the Veterans Farmer Training Program is under the control and direction of the Department of Public Instruction of this State.

INDIANS; EASTERN BAND OF CHEROKEE; SCHOOL ATTENDANCE STATUS

22 September 1947

I have your letter in regard to the question raised by Mrs. Rachel B. Sneed of Cherokee, North Carolina, in her letter of August 28th with respect to the school attendance status of children of members of the Eastern Band of Cherokee Indians of Western North Carolina.

Resident members of the Eastern Band of the Cherokee Indians of Western North Carolina are, of course, citizens of this State, and there is nothing in our State Constitution or statutes which prohibits a child whose parents are members of the Eastern Band of Cherokee Indians of Western North Carolina from attending a public school along with white children, provided such Indian child is qualified as to age, residence, and otherwise.

The mere circumstance that such Indian child is also entitled to attend a school conducted principally for Indians would not, in itself, bar attendance at a public school conducted principally for white children. Our State Constitution only provides for separate educational facilities for white and colored children, and our statutes providing separate schools for Croatan Indians of Robeson, Richmond and Person Counties apply only to those particular Indians.

For your convenience, I quote pertinent sections of our Constitution and Statutes as follows:

"Constitution of North Carolina, Article IX, Section 2:

"... and the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race."

"G. S. 115-2—Separation of Races:

"The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race."

SCHOOLS; TEACHER'S LEAVE OF ABSCENCE; RESIGNATIONS

27 October 1947

I acknowledge receipt of your letter of October 24 enclosing a letter from James D. Singletary, Instructor of Education of Bennett College in which he propounds the following question:

"If a teacher is granted a leave-of-absence by her Board of Education, has the Board of Education any legal claim on her services for the next school year: Can the teacher, while on leave accept a position in another school system or is she under legal obligation to return to the system that granted her the leave-of-absence?"

I understand that the State Board of Education has adopted a regulation, which in effect, authorizes local administrative units to grant leave of absences to teachers but that in no event is such leave of absence to extend beyond the current school year. Leaves of absences are usually granted for specific reasons or purposes, and as to whether or not the teacher could teach in some other school, during her leave of absence would depend on the conditions attached to the leave of absence. It seems to me that the resignation of a teacher, would have to take place after the close of the current school year and at least thirty days before the opening of the school which granted her the leave of absence.

SCHOOLS; EXCLUSION OF PUPILS ON ACCOUNT OF MARRIAGE

14 November 1947

This office rendered an opinion to you under date of the 17th of August, 1945, to the effect that the fact that a pupil has been lawfully married would not, in the opinion of this office, in itself be sufficient to justify the exclusion of such pupil from attending school.

SCHOOLS; LIABILITY FOR CHILDREN HURT ON SCHOOL GROUNDS

21 November 1947

Receipt is acknowledged of your letter of the 14th of November, 1947, wherein you enclose a copy of a letter from Mr. John W. Comer, Superintendent of Surry County Schools, in which inquiry is made as to the liability of the County or the school for accidental injuries sustained by children on the school grounds and in connection with the school.

There is no liability on the part of the State for such treatment and there is likewise no liability for the local school. This is a misfortune for the school child for which no compensation is or can be paid by the State or the local school authorities, unless the child was injured by the operation of a school bus on the school grounds, which I do not understand was the case in the instance about which you write.

SCHOOLS; REIDSVILLE CITY ADMINISTRATIVE UNIT; USE OF SCHOOL STADIUM

28 November 1947

I acknowledge receipt of your letter of November 25 enclosing copy of a letter from Superintendent C. C. Lipscomb of the Reidsville City Schools in which he inquires as to whether or not the Reidsville City School Board has authority to lease the school stadium for a period of five years.

I am enclosing herewith a copy of a letter which I wrote to Honorable P. W. Glidewell, attorney for the Reidsville City Administrative Unit in which I expressed the opinion that the City Administrative School Board could permit the use of the stadium for the playing of professional baseball during the summer months if such use would not interfere in any way with school functions and that the Board could make such charges for such use as it considered fair and reasonable. Of course, such authority would have to be concurred in by the State Board of Education as provided in Section 115-95 of the General Statutes.

I know of no statutory authority for school boards to enter into leases for the use of school property and I do not think that the use of such property as authorized by G. S. 115-95 contemplates an exclusive use by a professional baseball team or the authority to enter into a lease for a period of five years even though its use as provided for in the lease would not interfere with other school functions. It seems to me that no agreement should be entered into which would deprive the school board from exercising sole and complete use of school property at any and all times. However, I re-affirm the opinion expressed in my letter of February 5 to the effect that subject to the approval of the State Board of Education that the Local School board could authorize the use of school property when such use does not interfere with school functions and when the board reserves the right to terminate such use on its own motion.

SCHOOLS; DISTRICT COMMITTEEMEN; REMOVAL

6 December 1947

I acknowledge receipt of your letter of November 25 enclosing a letter from Superintendent Hobson of the Yadkin County Schools in which he inquires as to the authority of the County Board of Education to remove local school committeemen.

I think that Superintendent Hobson will find the answer to his question in Section 115-74 of the General Statutes which reads as follows:

"In case the county superintendent or any member of the county board of education shall have sufficient evidence at any time that any member of any school committee is not capable of discharging, or is not discharging, the duties of his office, or is guilty of immoral or disreputable conduct, he shall bring the matter to the attention of the county board of education, which shall thoroughly investigate the charges, and shall remove such committeeman and appoint his successor if sufficient evidence shall be produced to warrant his removal and the best interests of the schools demand it."

SCHOOLS; REPAIRS ON SCHOOL BUILDINGS LOCATED ON SITES WHEN
CONVEYANCE CONTAINS A REVERTER CLAUSE

16 December 1947

I acknowledge receipt of your letter enclosing a letter from Superintendent L. S. Inscoe of the Nash County Schools in which he states:

"Macedonia School in Nash County is badly in need of repairs and improvements. The house was erected by local trustees with proceeds of a bond issue authorized by Legislative enactment and voted by the people. The title for the site was given to the local trustees with the special provision, (1) That the person from whom land was purchased and all his descendants should have certain privileges in connection with the use of the property not enjoyed by other persons and (2) That when the property should no longer be used for school purposes title should revert to him or his descendants.

"Macedonia is no longer a special tax district and indebtedness has been fully paid. It is now a school in District No. 8.

"Would the Nash County Board of Education be forbidden to make repairs or improvements on Macedonia School building by G. S. 115-88?"

"If answer to above question should be affirmative, would the Nash County Board of Education have authority to condemn the site as to the special privileges granted to certain persons and as to reversionary title?"

I cannot be very definite in my opinion since I am not apprised of the rights retained by the grantors when the property was conveyed to the trustees and am likewise not acquainted with the exact wording of the reverter clause. And I doubt the authority of the County Board of Education to condemn the special privileges retained by the grantors. However, it seems to me that since title, even though subject to certain limitations, vest in the County Board of Education that the Board of County Commissioners could appropriate funds for the repairs of the building. The Board should determine whether or not the privileges retained by the grantors are such as would seriously interfere with the proper operation of the school.

SCHOOL LAW; MUNICIPAL CORPORATIONS; OPENING AND CLOSING OF STREETS

29 December 1947

Replying to your letter of the 23rd of December, 1947, you are advised that under the provisions of G. S. 160-200 (11), municipalities have the power to open new streets, change, widen, extend, and close any street or alley that is now or may hereafter be opened.

The copy of the Resolution of the Council of the City of Reidsville has been examined, and it is the opinion of this office that the same will accomplish the purpose of closing the street described therein.

This Resolution, however, would not have the effect of conveying this abandoned street to the City School Board. If the City acquired this street by outright purchase or gift or by condemnation, it could, under these circumstances, convey this property to the School Board; but in order to sell

it, it would first have to be advertised for thirty days and sold to the highest bidder for cash under the provisions of G. S. 160-59. If, on the other hand, this street had been dedicated by its original owners for street or alley purposes, then, upon its closing, the property formerly occupied by the street would revert to the original land owners.

SCHOOLS; SUPPLEMENTARY TAX PROCEDURE IN HOLDING ELECTION

23 January 1948

I acknowledge receipt of your letter of January 17 enclosing a copy of a letter from Superintendent Abernethy of the Shelby City Schools, in which he requests a copy of a manual which he understands that this office has prepared as to the procedure in holding supplementary school tax elections.

This office does not have such a manual, but one is in the process of preparation by the Institute of Government and of course is based somewhat upon opinions heretofore expressed by this office. I suggest that Superintendent Abernethy write Mr. Lewis of the Institute of Government requesting that a copy of the manual be sent to him if it has been completed.

In addition thereto Mr. Abernethy raises the following questions:

"(1) How should the resolution passed by the Board of Commissioners and the legal notices in regard to the election and the ballots be worded? In our case, we now have authorized a fifteen cent levy and will probably increase it twenty-five cents to make a total of forty cents."

"(2) What is the least time that can intervene before or after the primary elections to be held this spring may a special school tax election be held?"

As to the first question, I think that the answers may be found in Sections 115-361 and 115-188 and Articles 22, 23, and 24 of the General Statutes.

As to the second question I do not find any statute which limits the time which must intervene between a primary election and the date fixed for holding a supplementary school tax election.

SCHOOLS; USE OF SCHOOL BASEBALL PARK BY PROFESSIONAL BALL TEAM

10 February 1948

I acknowledge receipt of your letter of January 29 in which you enclose a letter from Superintendent T. T. Murphy of the Pender County Schools. He inquires as to whether or not the Board of Education of Pender County may permit the local semi-professional baseball team to use the school baseball park in consideration of the ball team making certain improvements thereto including fencing the park. I further understand that the use of the park by the baseball team would not interfere with any school activities.

While I know of no statutory authority for the board of education to lease school property to an outside organization, I am inclined to the opinion that the board of education could enter into an agreement with the

local baseball team permitting it to use the baseball park in consideration of improvement being made thereto and with the distinct understanding that no use of the park could be had when it in any way interfered with any school activities and with the further understanding that the county board of education could cancel the agreement at any time upon notice.

Superintendent Murphy further inquires as to the Sunday laws applicable to playing baseball on the Sabbath. The applicable statute is G. S. 103-1 which reads as follows:

"On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar."

SCHOOL BOND ELECTIONS; SPECIAL REGISTRATION

9 March 1948

I received your letter of March 5, enclosing copy of your letter from Mr. Fred C. Hobson, Superintendent of Schools in Yadkin County, in which he requests me to give some expression of opinion as to a special registration in a school bond election.

Under the County Finance Act, under which the elections for the issuance of school bonds are held, the governing body of the county in which such election is held may, in its discretion, order a new registration of voters for the election. See, G. S. 153-94. This is a matter entirely within the discretion of the County Board of Commissioners. Frequently special registrations are ordered as it is often considered that special registrations would be advantageous in elections for the issuance of bonds necessary for the constitutional six months school term. The vote in the election is determined by a majority of the votes cast and the vote is not against the registration, as this is for a necessary expense.

SCHOOLS; SUPPLEMENTAL TAX; TAXATION OF PROPERTY OF INDIANS IN DISTRICT

23 March 1948

I received your letter of March 19, enclosing copy of a letter to you from Mr. B. E. Littlefield, Superintendent of Schools in Fairmont.

Mr. Littlefield calls attention to the provision of Chapter 256 of the Public-Local and Private Laws of 1939, creating the Fairmont School Administrative Unit, with a provision in subsection (b) of Section 5 that Indians residing in the unit are excluded from these schools, and denies them the right to vote in the primary or general election of the trustees. Attention is called to Chapter 344 of the Session Laws of 1945, authorizing the district to levy taxes. The schools for the Indians within the territory are conducted as a part of the county unit.

Mr. Littlefield states that a petition has been filed requesting a supplemental election so that schools may be operated at a higher standard than that provided by State support, in connection with which he submits the following questions which I have attempted to answer:

"1. If said election is ordered by the county commissioners, would the Indians, qualified by law to vote, be entitled to vote in the aforesaid election?"

I have considerable doubt as to the validity of an Act which would exclude any persons residing in the area, and otherwise qualified to vote, from voting in the election, but as the Indians are excluded from the schools it is my opinion, as hereinafter stated, their property should not be taxed. As a practical matter, I should think they should not be entitled to vote in the election.

Mr. Littlefield's second question is as follows:

"2. If the election carries would the tax levied be uniform on all property within the boundaries of said administrative unit, or would all property belonging to Indians be excluded from said levy?"

Again I have a question as to the validity of a tax which was not equal and uniform as to all property in the district to which the tax applied, but as the Indians would be denied the privilege of voting and the use of the school, I do not believe that the tax should be applied to their property.

The third question is as follows:

"3. Does this act and the amendment thereto create an administrative school unit designated within the boundaries described therein and excluding all lands lying therein and other property owned by Indians?"

The Act itself says nothing about excluding lands lying therein and other property owned by Indians. The Act merely provides that it shall not apply to, affect or include Indians residing in said unit or any Indian school therein. In effect, it might have the result of excluding the lands of the Indians lying within the district so far as the right to tax it is concerned.

The fourth question is as follows:

"4. If it is determined that the property belonging to the Indians is not subject to taxation under an election held as provided in Article 22, Section 115, of the General Statutes of North Carolina, should such fact be stated in the petition to the trustees of said unit, in the minutes of the trustees, in the minutes of the County Commissioners, and in the notice of said election to be published?"

I believe it would be desirable to state in the petition that property belonging to Indians in the district would not be subject to the tax to be levied.

SCHOOLS; LEASE OF REAL PROPERTY TO CIVIC ORGANIZATIONS

12 April 1948

I acknowledge receipt of your letter of April 2 in which you enclose a copy of a letter from Superintendent Hobson of the Yadkin County Schools in which he writes as follows:

"Two civic organizations in the town of Boonville desire to lease a corner of the school property for the purpose of erecting a community building thereon for non-profit purposes. The Boonville Board of Trade and the Boonville Grange are sponsoring the project and the building would be available for use by various community and civic organizations. The Board of Education is willing to cooperate with the Boonville community provided it has the legal authority to do so."

I know of no statutory authority for a school board to lease school property. Section 115-86 of the General Statutes authorizes sale of school property at public auction to the highest bidder when such property is found not to be necessary for the operation of the school, but it will be observed that this section does not empower school boards to enter into leases.

This office has on several occasions suggested that school boards might lease certain school properties which are not at the time considered necessary to the operation of the schools, provided that the lease contained a provision that it could be cancelled at any time upon request by the school authorities. It may be that in your case the school board could lease the real property in question to the civic organization providing in the lease that it could be terminated at any time. But I doubt if the Civic organization would want to enter into such a lease, as it might be that within a short time after the completion of the community building the Board of Education would find that the land that was leased was needed by the school for school purposes.

SCHOOLS; SUPPLEMENT TAX ELECTION IN CITY ADMINISTRATIVE UNITS;
WHAT IS MEANT BY PHRASE, "TAX LEVYING AUTHORITIES"

19 April 1948

I received your letter of April 15, enclosing a letter to you from Mr. M. T. Lambeth, Superintendent of Statesville City Schools, in which the question is raised as to the proper construction to be placed upon the language found in the law providing for school supplement elections, G. S. 115-361, which provides that upon request of the county board of education in a county administrative unit and/or the school governing authorities in a city administrative unit, *the tax levying authorities of such unit* shall provide for an election to be held under the laws governing such elections.

This question was raised by Honorable Robert A. Collier, Mayor of Statesville, and a letter was written to him by Mr. Rhodes of this staff

under date of March 31, 1948, a copy of which was sent to you. And Mr. Rhodes also wrote to Mayor Collier again on April 6, in which he said that the opinion expressed in the letter of March 31 had not been changed.

As you will see from the letter of March 31, Mr. Rhodes did not express any positive opinion on the question involved but, rather, indicated that the administrative practice of having the elections conducted by the municipal authorities should be followed in Statesville as the precedent for it had been set in the previous election.

As pointed out by Mr. Rhodes, there has been no Supreme Court decision construing the language of the statute which is under consideration.

Undoubtedly, the boards of commissioners of the various towns are the tax levying authorities of those towns for municipal purposes and when the school districts are coterminous with the boundaries of the municipality, it could be well argued that they were the tax levying authorities referred to in the statute.

While I cannot be certain about it, I am inclined to the opinion that if the election is conducted by the municipal authorities of the City of Statesville, it would be upheld by the Court. I regret, however, that I cannot give any more definite and positive opinion on the subject.

MUNICIPAL CORPORATIONS; STREET ASSESSMENTS; LIABILITY OF THE
GOVERNING AUTHORITY OF SCHOOL UNIT FOR THE
PAYMENT OF ASSESSMENTS

21 May 1948

You enclose us letter from Mr. Dick Gurley, Superintendent of the Newton-Conover City Schools. Superintendent Gurley states that the Town of Conover is planning to lay a concrete sidewalk adjoining the Conover Grammar School. The sidewalk will run for approximately seven hundred feet. Superintendent Gurley would like to know if the school authorities can be made to pay for their part of the sidewalk. He further states that in the past, the Town of Newton has paid all the expenses of laying sidewalks adjoining the Newton School.

I think this question is answered by the case of *RALEIGH v. PUBLIC SCHOOL SYSTEM*, 223 N. C. 317. It was there held that lands owned by the School Committee of Raleigh Township, in Wake County, and used exclusively for public school purposes are liable for assessments for street improvements made by the City of Raleigh. The Court points out that while the Constitution exempts school property from taxation, nevertheless, assessments on public school property for special benefits thereto caused by the improvement of the street on which it abuts are not embraced within the constitutional prohibition. It was also decided to the same effect in *TARBORO v. FORBES*, 185 N. C. 59.

We are of the opinion, therefore, that the school authorities of Conover Grammar School do have the power to pay the expenses of laying the sidewalks assuming the use of the proper budgetary funds. .

DOUBLE OFFICE HOLDING; CITY COMMISSIONER; MEMBER OF COUNTY BOARD
OF EDUCATION; MEMBER OF A LOCAL SCHOOL COMMITTEE;
CHAIRMAN OF LOCAL PARTY PRECINCT COMMITTEE;
MEMBER OF PARTY COUNTY EXECUTIVE
COMMITTEE; MAYOR

23 June 1948

In your letter of the 22nd of June, 1948, you enclose a copy of a letter from W. E. Sawyer, Saluda, North Carolina, wherein he inquires if the above-named offices are public offices within the meaning of Article XIV, Section 7, of the Constitution, which prohibits double office holding.

All of the offices listed above except that of chairman of a local party precinct committee and membership on a county party executive committee are public offices within the constitutional prohibition against double office holding, and no person may hold more than one of these offices at the same time.

With respect to chairmanship of a local party precinct committee and membership on a county party executive committee, you are advised that acting as a member of a political party precinct committee is not holding an office in the sense used in the constitutional provision against double office holding. This is not in any sense a public office but only a part of the organization of a political party, which is entirely different.

OPINIONS TO COMMISSIONER OF REVENUE

INCOME TAXATION; FOREIGN CORPORATIONS; DEMOUNTING STRUCTURES IN THIS STATE UNDER FEDERAL CONTRACT

15 July 1946

You have referred to me a letter written under date of June 12, 1946, by Sol L. Auerbach, Project Accountant for the Federal Public Housing Authority. It appears that the Federal Public Housing Authority, Region VIII, Cleveland, Ohio, has entered into a cost-plus-a-fixed-fee contract with corporations of Ohio, New York and other states for the demounting of structures at Camp Davis, N. C., for shipment and re-erection in Ohio, Michigan, Kentucky and West Virginia.

Mr. Auerbach states: "These contractors will be paid certain percentages of their fixed-fee on the basis of physical completion of the erection work. Thus, the legal question arises as to whether any of the corporations' income would be earned in North Carolina.

"Since the Federal Government will reimburse the contractors for various contract expenses and any special type of taxes which are co-incidental with the job, this office is desirous of getting an opinion as to the probable liability of the government because of this work."

Mr. Auerbach seems to suggest that inasmuch as the contractors' compensation is to be computed on the basis of physical completion of erection work, none of said compensation would be attributable to demounting operations in this State, and it would follow that no income would be earned by said contractors in this State. If this is his position, I am unable to agree with him. Although I have not had occasion to examine the contracts which are to be entered into in this case, it would seem reasonable to assume that the demounting of structures in this State is as necessary a part of the contractors' functions under the contracts as is the erection of the structures in another State, and that the demounting of the structures in this State is one of the conditions precedent to the contractors' rights to any compensation under the contracts. It would seem to me that the income derived by the contractors must be attributable to all of their operations under the contracts. It would seem, also, that the demounting of structures in this State is as necessary to the earning of the income as is the erection of the structures in another State. Cf. *UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN*, 254 U. S. 113, 65 L. ed. 165.

Mr. Auerbach states that "the Federal Government will reimburse the contractors for various contract expenses and any special type of taxes which are co-incidental with the job." Income tax imposed on these contractors by the State of North Carolina could hardly be considered either "contract expenses" or a "special type of taxes which are co-incidental with the job." It hardly seems probable that the United States Government should reimburse any corporation the amount of income taxes which it pays to a State. However, even if the Government should assume the economic burden of the contractors' taxes under a cost-plus-a-fixed-fee contract, that fact would not invalidate the tax. *ALABAMA v. KING AND BOOZER*, 314 U. S. 1, 86 L. ed. 3.

Therefore, under the facts presented in Mr. Auerbach's letter, it is my opinion that the contracting corporations would be liable for income tax upon income apportioned to this State under the statutory formula. Of course, I shall be glad to consider any further facts which may be presented in the matter.

SALES TAX; EXEMPTIONS; SALES TO NATIONAL BANKS

15 July 1946

You have requested me to advise you whether or not you should include in a retailer's gross receipts, for the purpose of computing sales tax, those amounts received from the sale of tangible personal property to national banks.

National banks are not merely private moneyed institutions, but agencies of the United States, created under its law to promote its fiscal policies, and hence they cannot be taxed by the States except as Congress consents. *FIRST NATIONAL BANK OF GUTHRIE CENTER v. ANDERSON* (1926) 269 U. S. 341, 70 L. ed. 295. While Congress has consented to certain forms of State taxation upon national banks, that consent does not extend to the imposition of a State excise or sales tax upon national banks. 12 USCA, Section 548. Therefore, if our law imposes a sales tax upon a national bank, then to that extent it is invalid.

Our sales tax article does not specifically exempt national banks from the tax thereby imposed. However, Section 406 (e) provides an exemption in the case of "the gross receipts from sales of tangible personal property which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State." Even in the absence of an express exemption to such effect, the "doctrine of implied constitutional immunity" would operate to exempt from taxation in those instances in which the Constitution would otherwise be contravened. 47 *Am. Jur., Sales and Use Taxes*, Sec. 13.

Therefore, the sole question here is whether or not our sales tax, as applied to sales to a national bank, contravenes the Constitution.

In *FEDERAL LAND BANK v. BISMARCK LUMBER CO.*, 314 U. S. 95, 86 L. Ed. 65, the Supreme Court of the United States considered an Iowa sales tax statute. The Court stressed the fact that the sales tax involved in that case was one which was required to be passed on to the consumer, and was one which the State Supreme Court had held to be a tax on the purchaser. See *Anno.* 86 L. ed. 72, at p. 80. It was apparently on the ground that the sales tax in that case was a tax on the consumer that the Supreme Court of the United States declared such tax invalid as applied to a sale to a Federal Land Bank.

In *WESTERN LITHOGRAPH CO. v. STATE BOARD OF EQUALIZATION*, (1938) 11 Cal. (2d) 156, 78 P. (2d) 731, 117 ALR 838, the Supreme Court of California had before it the California sales tax statute, and the question involved the taxability of a sale to a national bank. The Court held that the California statute imposed the sales tax not on the consumer, but on the merchant, and that the fact that such tax may actually be borne by the consumer, in this case a Federal instrumentality, does not constitute such a direct burden upon the Federal instrumentality as to constitute an unconstitutional interference with Federal functions. See also *Anno.*,

140 ALR 621 at p. 631; *Anno.*, 117 ALR 855; 47 *Am. Jur., Sales and Use Taxes*, Sec. 13 and Sec. 20. Cf. *ALABAMA v. KING AND BOOZER*, 314 U. S. 1, 140 ALR 615.

The United States Supreme Court case and the California case are distinguishable on their facts, in that in one case the State Court construed the statute as imposing the tax on the consumer, and in the other case the State Court construed the statute as imposing the tax on the merchant who had the option of passing the same on to the consumer. It would seem that the North Carolina statute would be held by our court to impose its tax on the merchant rather than the consumer, so as to bring our statute within the principle announced in the California case. *LEONARD v. MAXWELL*, 216 N. C. 89.

However, it is by no means certain that the California case represents the views of the U. S. Supreme Court. If the question in the California case were presented to the U. S. Supreme Court, it is possible that the latter court would decide that such a tax constitutes an interference with Federal functions, even though not laid upon the consumer, in this case a Federal instrumentality. The California case was decided several years prior to the Bismarck Lumber Co. case, and it cannot be considered any longer as dependable authority. It is interesting that, notwithstanding the California case, the Federal authorities take the position that sales to the Government are exempt if the tax is actually passed on to the Government, even though the statute may not require the merchant to pass the same on to the consumer. *Prentice-Hall State and Local Tax Service*, Vol. I, par. 7045.

Our own administrative practice has been to exempt from sales tax those sales which are made to Federal instrumentalities. The administrative interpretation is entitled to great weight. *CANNON v. MAXWELL*, 205 N. C. 420; *POWELL v. MAXWELL*, 210 N. C. 211; *VALENTINE v. GILL*, 223 N. C. 396. Moreover, it should be observed that although our law does not "require" the tax to be passed on to the consumer, it does "contemplate" that such tax shall be passed on to the consumer, and such is the express purpose of the statute.

In view of the fact that the Federal authorities take the position that a direct sale to the Federal Government or to one of its instrumentalities is not taxable, and the fact that it has been your administrative practice to exempt such sales, together with the uncertainty in the law respecting this question, I am impelled to the conclusion that sales to the Federal Government or its instrumentalities, including national banks, are exempt from the sales tax. It follows that the merchant making such sales should exclude the same from his taxable gross sales.

SALES TAX; INTERSTATE COMMERCE; SHIPMENT TO NON-RESIDENT
AFTER COMPLETION OF SALE

15 July 1946

You have requested my opinion upon the following hypothetical statement of facts.

A North Carolina resident walks into the place of business of a North Carolina retailer and purchases for cash paid across the counter a com-

modity not exempt as such from the retail sales tax. The resident purchaser then instructs the retailer to mail the commodity to a person outside the state of North Carolina. You wish to know if this transaction would be exempt from the sales tax as a transaction in interstate commerce.

If the retailer mentioned above is one who engages in the business of making sales "across the counter" rather than mail order sales, I am of the opinion that these facts at least raise a presumption that the sale of the commodity was completed prior to its entry into interstate commerce. However, the answer to this question depends on whether or not the shipment in interstate commerce is an essential part of the sale transaction, and it is possible that a taxpayer may present sufficient facts to show that the sale is an interstate transaction. It would seem that the proper course for you to follow in these cases is to presume that the sale is a local sale, but allow this presumption to be rebutted by such evidence as a taxpayer may wish to present. I do not believe that any rigid rule can be applied in such a case.

INCOME TAXATION; LIABILITY OF GAIN AT MATURITY OF ENDOWMENT INSURANCE POLICY

15 July 1946

I have before me the proposed tax refund to Mr. Francis Russel Fisher, Oriental, N. C., together with correspondence from your file in connection therewith. You propose a refund on the basis of the following facts:

"Return filed 3/15/45 net taxable income \$1,005.91. Tax paid \$30.18. Examination showed that the taxpayer's mother filed a return for him while he was in the armed services and included in the total gross income the proceeds of a matured endowment policy received from the Lincoln National Life Insurance Company in the amount of \$1,330.36. As this amount is more than the net taxable income he should be refunded for the entire tax paid per Sections 317-2-(b) and 333-1."

At my request you made further inquiry in this matter, and received a letter from the Lincoln National Life Insurance Company, under date of June 7, 1946, stating that the endowment policy in question matured for a face value of \$4,000; that the premiums paid amounted to \$2,669.64; that the difference between these two amounts, \$1,330.36, represents the gain at maturity, with reference to which there is a question as to taxability. The insurance company stated further that they did not maintain a record of the individuals who pay premiums on policies, but that this was a juvenile policy issued on the life of the insured at the age of four months, and that it could be assumed that the parents paid the premiums. The insurance company stated further that the first two annual premiums were paid as they fell due, and that in 1928 the additional premiums required to pay up the policy in full were paid, the insured being only two or three years old at that time.

In my opinion, the difference between the aggregate amount of premiums and the value of the endowment policy at maturity represents taxable income to the insured. Section 317(2)(b) provides that the words "gross income" do not include "the amount received by the insured as a return of premium or premiums paid him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract." The definition of gross income contained in Section 317 is sufficiently broad to cover the income in question; and the only part thereof specifically exempt is that part of such income which represents a return of premiums. It follows that the excess above the amount of the premiums is taxable. This rule obtains also with the Federal Government. *Prentice-Hall Federal Tax Service*, 1946, para. 8227.

I am, therefore, of the opinion that the tax refund in this case should not be made.

INCOME TAXATION; TAXABILITY OF LIQUIDATING DIVIDENDS

15 July 1946

I have your letter of June 3, 1946, attaching a letter addressed to you by Mr. Worth G. Giles, Field Auditor, under date of May 22, 1946, and a letter addressed to you by Mr. W. E. Bayless, Deputy Collector. In behalf of the taxpayer, Mr. Frank C. Atkinson, Mr. W. Bowen Henderson, Certified Public Accountant of Asheville, N. C., contends that profit resulting from liquidating dividends of a corporation is not taxable, and he cites an opinion of the Attorney General in the *Biennial Report of the Attorney General 1926-1928*, p. 202, July 10, 1928, to that effect.

In my opinion, the gain realized by a taxpayer from the final distribution of corporate assets is taxable income. Section 319 of the Revenue Act specifically provides that "the final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly." It seems clear to me that this provision embraces what is commonly known as "liquidating dividends." The opinion of the Attorney General cited by the taxpayer apparently does not take this provision of the Revenue Act into account. At any rate, this office on October 29, 1940, expressed the opinion that liquidating dividends are taxable, and it has been the administrative practice for many years to tax the same.

Although not controlling in this case, the Federal Internal Revenue Code treats liquidating dividends as payment in exchange for stock, and recognizes gain or loss accordingly. *Prentice-Hall Federal Tax Service*, 1946, para. 9190.

INCOME TAXATION; CORPORATIONS DOING BUSINESS; MAINTAINING OFFICE WITH BOOKS OF ACCOUNT, BANK ACCOUNT, ETC.

15 July 1946

You have requested me to advise you of my opinion of the taxability of a corporation under the facts hereinafter set forth. The corporation in this case is the Maywood Hosiery Mill, which is represented in this matter by Mr. W. Latimer Brown, Certified Public Accountant, Charlotte, N. C.

The corporation, hereinafter referred to as the taxpayer, is a Georgia corporation. It does no business in North Carolina other than the sending out of bills and the collecting of accounts from one of its three customers, which are located respectively in the District of Columbia, Virginia and North Carolina. Sales to these customers are made direct from the Georgia office of the taxpayer. I understand also that the taxpayer maintains in connection with its bookkeeping and accounting activities in this State a bank account or bank accounts in this State, and that checks are drawn on said bank account or bank accounts from the office in this State.

The taxability of the taxpayer in this case depends on whether or not the taxpayer can be said to be doing business in this State. In my opinion, the taxpayer under these facts is doing business in this State. I have examined the authorities on this question, and have been unable to find that the U. S. Supreme Court has passed on a case involving only the meager facts recited here. However, the U. S. Supreme Court has passed on the same question in other cases embracing the facts recited here together with others. It seems clear from these decisions that some of the indicia of "doing business" in a State is the maintenance therein of an office from which and in which it carries on correspondence relating to the corporate business, keeps books of account, receives remittances from customers, and maintains a bank account. *ATLANTIC LUMBER CO. v. COMMISSIONER OF CORPORATIONS AND TAXATION*, 298 U. S. 553, 80 L. ed. 1328; *CHENEY BROS. CO. v. MASSACHUSETTS*, 246 U. S. 147, 62 L. ed. 632.

In a case involving not taxation but amenability to legal process, our own court has held that a foreign corporation is subject to service of process in this State where its agent is engaged regularly in making collection of the corporation's accounts for goods sold in this State. *MAUNEY v. LUZIER'S*, 212 N. C. 634.

For the reasons here given, I am of the opinion that the taxpayer in this case is doing business in the State, and that its income is taxable in the proportion determinable by the apportionment formula.

GENERAL ADMINISTRATION; GARNISHMENT OF SALARIES OF COUNTY OFFICERS

15 July 1946

You have requested me to advise you of my opinion on the question whether or not you may garnishee the salary of a county attorney on account of unpaid income taxes.

Section 913 of the Revenue Act provides, among other things, that, where taxes are unpaid, salaries, wages and other intangible property belonging, owing or to become due to the taxpayer shall be subject to attachment or garnishment, as therein provided, and that "the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Act to the extent of the amount of the intangible belonging, owing or to become due to the taxpayer subject to the set-off of any matured or unmatured indebtedness of the taxpayer to the garnishee." To effect the attachment or garnishment the Commissioner of Revenue serves a notice on the garnishee, who may set up a defense or off. If he disallows the same, the cause is transferred to the Superior Court.

The question is whether or not a county may be made a garnishee by the Commissioner of Revenue under this statute.

As far as the rights of private individuals are concerned, it seems well settled that, in the absence of express statutory provision, a county cannot be subjected to the process of garnishment. This rule is founded on public policy and rests on the theory that to allow garnishment of a county would work to the inconvenience and detriment of the public service. 4 *am. Jur.*, *Attachment and Garnishment*, Secs. 143 and 327; 28 C. J., *Garnishment*, Sec. 219; 38 G. S. *Garnishment*, Secs. 39, 40, 116. Some courts seem to place the rule on the ground that the salary of a public officer is not an "indebtedness," within the meaning of the garnishment statute because it does not arise out of contract. *Anno.* 56 ALR 606. Our court seems not to have passed on the question whether or not salaries of public officers are subject to garnishment, even as to private creditors, although it has held that county property and funds are not subject to execution for a debt owed by the county. *Hughes v. Commissioners of Craven County*, 107 N. C. 598.

The question here relates not to the rights of a private person as creditor, but to the right of the Commissioner of Revenue, representing an arm of the State government, to enforce the collection of taxes through the process of garnishment. While it must be conceded that the rights of a private creditor cannot be judged by the same standards as the right to enforce collection of taxes, it seems that, with reference to this question, the same principles of public policy prevail in either case, although perhaps not in the same degree. In other words, whether the garnishment process flows from a private creditor or from a State department, it tends to interfere with the county's governmental functions.

This is not to say that the legislature cannot make a distinction between private creditors and the collection of taxes, but that in the absence of any indication of legislative intent to differentiate, it would seem that the general rule should apply.

Essentially the question here is whether or not the legislature intended that the word "person," as used in Section 913, should embrace counties. Whether or not the word "person" includes counties usually depends on the context and the extent and purpose of the particular law. *Cf. Wallace v. Moore*, 178 N. C. 114.

"General statutes do not bind the sovereign, unless specially mentioned in them. . . . The county is a part of the delegated authority of the State, and its *pro hac vice* the State." *Guilford County v. The Georgia Company*, 112 N. C. 35; *State v. Garland*, 29 N. C. 48. Section 913 of the Revenue Act is a general statute relating to the garnishment of "persons" who hold intangibles belonging to a taxpayer. I am not inclined to interpret the word "persons" so broadly as to include a county, which is a political subdivision of the State, and, therefore, a part of the State government, unless there is language in the statute which clearly indicates the legislative intent that counties should be so included. I find no such indication in the statutes. On the contrary, the procedure provided by the statute implies, in my opinion, a reference to persons other than branches of the government. I am unable to find any language which, in my opinion, would be sufficient to justify a construction to the effect that a county may be-

come liable to the State for its employee's taxes. In the absence of express statutory language including counties within those "persons" who may be made garnishees, I am impelled to the conclusion that counties are not so included.

This conclusion is supported to some extent by *O'Berry v. Mecklenburg County*, 198 N. C. 357, wherein our court held that a statute which laid a gasoline excise tax on "distributors" (defined as "any person, firm, farm, association or corporation," etc., that has motor fuel for sale, distribution or use) did not apply to counties because counties were not expressly named.

Although I think the answer to your question is not free from doubt, I am of the opinion that under our present statute you have no authority to garnishee the salary payable by a county to its county attorney.

INCOME TAXATION; DEDUCTIONS; PAYMENT TO CONSUMERS
FOR OPA OVERCHARGES

15 July 1946

You have requested me to advise you of my opinion as to whether or not the Durham Hotel Corporation, hereinafter called the taxpayer, may deduct from its gross income for the year 1944 the amounts paid by the taxpayer to the Federal Government for the benefit of its guests who were overcharged for their rooms during the year 1944. This office has already ruled that settlement of the OPA Administrator's claim on account of violations of the Emergency Price Control Act of 1942 represents the payment of a penalty and is not a deductible expense.

However, the facts which you have presented to me in this case raise the possibility that a different situation may exist, in that the amounts paid by the taxpayer to the Federal Government were paid not in settlement of the Administrator's claim, but in settlement of the consumer's claim against the taxpayer. There is a suggestion that the payments in this case were refunds to guests of the hotel.

The Federal authorities take the position that settlement of consumers' claims under the Emergency Price Control Act of 1942 are deductible from gross income for Federal income tax purposes as a business expense. *Prentice-Hall Federal Tax Service*, 1946, paragraph 11,086-D. Inasmuch as such ruling results from Federal interpretation of the Emergency Price Control Act of 1942, which is a Federal Act, it would seem proper for us to take the same position. In other words, if the Federal authorities take the position that payment of amounts under these circumstances do not constitute payment of a penalty under the Federal Act, I believe that we would be justified in accepting that interpretation.

However, the facts which have been presented to me in this case are not sufficient for me to determine whether or not the amounts paid by the taxpayer and claimed as deductions represent settlement of the Price Administrator's claim or refunds to customers who were overcharged. Before the deductions are allowed, I am of the opinion that you should require an additional submission of evidence on this point.

INCOME TAXATION; EXEMPTIONS; HEAD OF HOUSEHOLD; STATUS OF
HUSBAND WHO SUSTAINS LOSS IN YEAR IN WHICH
WIFE EARNS INCOME

18 July 1946

I have your letter of June 3, 1946, in which you request my opinion based on the following facts.

On December 31, 1943, Mrs. Carolyn P. Sherrill was living with her husband, J. B. Sherrill, and their minor child. During that year she received a total income of \$3,815.42. During the same year her husband received a total income of \$9,296.26, but his return showed a net loss or deficit for that year on account of (1) loss sustained on operations of the Charlotte Garment Co., and (2) the taking of a carry-over loss from 1942. In view of the fact that the husband's return showed a deficit, the wife claims a personal exemption of \$2,200, *i.e.*, \$2,000 as "head of a household," and \$200 for the dependent child. In auditing the wife's return, you disallowed all exemption except \$1,000 personal exemption. The wife has protested the assessment which you have made on the basis of such disallowance, contending that the wife is entitled to claim personal exemption as head of the household because the husband had no net income during that year.

I am of the opinion that the taxpayer's position cannot be maintained. If the husband is otherwise head of the household, the fact that he may sustain a net loss during one taxable year when his wife earns a net income does not, in my opinion, deprive him of his status as head of the household. There is no indication from these facts that the husband either has actually ceased to support his wife and child or that he has escaped any legal or moral obligation to do so. The mere fact that a wife may earn more income than a husband, or even earn income, during a taxable year in which the husband earns no income does not show that the right to exercise family control has been shifted from the husband to the wife, or that the moral or legal obligation to support his wife and child has been removed from his shoulders. Although the absence of actual support by the husband during the taxable year of itself would not be sufficient to render the wife the head of the household within the meaning of the statute, there is no indication in this case that the husband ever ceased to provide such actual support. Certainly the mere fact that he makes no income in the taxable year does not indicate that he did not support his family during that year.

Therefore, I conclude that the evidence in this case is insufficient to show that the wife is entitled to the exemption as head of the household and that your disallowance of such exemption is proper.

INCOME TAXATION; DEDUCTIONS; CONTRIBUTIONS TO COLLEGE FRATERNITY
HOUSING FUND

19 July 1946

I have your letter of June 3, 1946, requesting me to advise you of my opinion as to the deductibility for income tax purposes of contributions made by individuals and corporations to a fund created by a fraternity at

State College for the purpose of erecting a fraternity house. You state that this fraternity is a non-profit organization, and that if the house is sold at any time for a profit, such profit will be delivered to N. C. State College.

Assuming that the fraternity in question is entirely a non-profit organization, and that no part of its earnings inures to the benefit of its members or stockholders, it would not follow that contributions made to such organization or to a fund created by such organization would be deductible by the individual or corporation who makes such contributions. In order for a contribution or a gift to be deductible from the income of the contributor or donor, the fund to which such contribution or gift is made must be "organized and operated exclusively for religious, charitable, literary, scientific or educational purposes or for the prevention of cruelty to children or animals;" and as an added requirement no part of the net earnings of the fund may inure to the benefit of any private stockholder or individual.

In my opinion, a fund created for the purpose of erecting a college fraternity house does not have purposes which are exclusively religious, charitable, literary, scientific or educational. Therefore, I am of the opinion that contributions to such fund by individuals or corporations are not deductible under Section 322 of the Revenue Act.

INCOME TAXATION; DEDUCTIBILITY OF LOSS IN STATE HAVING
NO TAX BASED ON NET INCOME

30 July 1946

I have your letter of June 3, 1946, with reference to Southern Products and Silica Company, Hamlet, N. C. This is a North Carolina corporation engaged in the business of manufacturing cement and flint pebbles. During the fiscal years ended September 30, 1943, and September 30, 1944, this corporation carried on operations in the state of Texas resulting in a loss for each year. You have correctly disallowed the corporation's contention that it should allocate a percentage of its net income to this state by use of the statutory apportionment formula, and you have computed the tax on the corporation's entire net income.

However, you desire to be advised as to whether or not the losses from operations in Texas during the two years named above are deductible for the purpose of computing net income taxable by this state.

Texas has no tax which is based on net income. Therefore, it is my opinion that North Carolina should treat all income of this corporation as having been earned in this state, and all loss as having been incurred in this state. It seems clear that under the circumstances mentioned above we would tax the entire net income of this corporation, regardless of the fact that some of said income will have been earned in another state. It is my opinion, therefore, that we should also deduct any loss which may occur in such other state. See Section 322 (10), 1943 Revenue Act.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME;
STATUTE OF LIMITATIONS

30 July 1946

You have referred to me a letter addressed to you, under date of June 11, 1946, by Harry C. Northrop, Certified Public Accountant, Charlotte, N. C., who represents Economy Auto Supply, Inc., Burlington, N. C., hereinafter referred to as the taxpayer.

In this case the taxpayer complied with Section 334 of the Revenue Act by notifying the Commissioner of Federal correction of income within thirty days after receipt of Internal Revenue Agent's report, or supplemental report. Because of this, he takes the position that the Commissioner of Revenue is barred by the three-year statute of limitations from making assessment for additional income reflected by the Federal change. He bases his contention upon the theory that where the taxpayer fails to give the notice, the statute of limitations against the Commissioner shall not apply, but where the taxpayer gives the required notice, the statute of limitations against the Commissioner shall apply.

In my opinion the taxpayer has misconstrued Section 334. This office has consistently held over a period of years that the notice required by Section 334 is a new "return," and that the statute of limitations referred to in Section 334 and Section 335 is that which runs, if at all, from the time of this new return. In other words, if the return is filed, the Commissioner has three years within which to make an assessment, and he is barred by the statute of limitations in such case after the lapse of three years from the due date of this new return; but if the taxpayer fails to give the required notice under Section 334, then the statute of limitations does not apply, and the Commissioner may make the assessment even though more than three years have elapsed from the due date of the new return. I believe that the taxpayer in this case has made the mistake of relating the statute of limitations to the original return rather than to the new return. The very purpose of Section 334 is to reopen the matter and revise the respective rights of the Commissioner and the taxpayer where the statutes of limitation have barred such rights under the original return.

Aside from the fact that the taxpayer's contention is inconsistent with the position which has been taken by your department for many years, such contention seems to me to be somewhat anomalous. There could be no purpose in requiring the taxpayer to file the notice of Federal correction if the very act of filing barred the Commissioner's right to act on said notice.

INCOME TAXATION; FRANCHISE TAXATION; INTANGIBLES
TAXATION; EXEMPTION OF CAROLINAS CHAPTER,
NECA, INC.

31 July 1946

You have submitted to me for examination a copy of the certificate of incorporation of Carolinas Chapter, NECA, Inc., and have requested my opinion upon its taxability for purposes of income tax, franchise tax, and intangibles tax.

The form of said certificate is a recognized one in this State. I am informed that it is a form recommended by the Secretary of State. It is the only form of this kind in *Douglas' Forms*. The certificate states that the corporation is a non-stock corporation. This is another way of saying that the corporation shall be a non-profit corporation. While the certificate does not state that the corporation shall be non-profit, I find nothing in said certificate to authorize the distribution of earnings to any member or any other private individual. The purpose of the corporation is to promote and advance the interests of electrical contractors in the installation, alteration, servicing and maintenance of electrical appliances and equipment, including the purchase and sale of such equipment; to promote qualification of electrical contractors as engineer-salesmen in achieving wider and more efficient distribution and safer and more satisfactory installation of electrical equipment; to promote a spirit of co-operation and good will among the members and their acceptance of fair industry practices; to collect and disseminate information of value to the industry and to the public, including trade and industry statistics; to promote sound labor relations on the basis of labor and management co-operation in the public interest; to promote and co-operate in developing the National Electrical Code and other technical and safety programs having as their objects safe, adequate and improved quality of electric service to the public; to represent the interests of the industry before legislative assemblies, governmental agencies and other groups; and to co-operate with other branches of the Electrical and Construction Industries in furthering fair and ethical business practices and in improving products and services.

In my opinion, this corporation is exempt from income taxation and from franchise taxation as a business league, no part of the net earnings of which inures to the benefit of any private stockholder, individual or other corporation. See Section 213 and Section 314.

I am not aware of any provision of the Revenue Act which would exempt this corporation from intangibles taxation.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME; RIGHT TO REFUND BY
RECOUPMENT AGAINST TAX ARISING OUT OF SAME TRANSACTION

2 August 1946

You have requested me to advise you of my opinion upon facts which have been presented to you in a letter under date of May 30, 1946, from George G. Scott and Company, Certified Public Accountants, Charlotte, N. C., who represent Shelby Cotton Mills, Inc., Shelby, N. C., hereinafter referred to as the taxpayer.

The question here arises under Section 334 of the Revenue Act, which provides in substance that if the taxpayer's net income for any year is changed by the Federal Government, the taxpayer within thirty days of the Internal Revenue Agent's report shall make return of such corrected net income to the Commissioner of Revenue; that if he fails to do so "the statute of limitations shall not apply"; that the Commissioner shall thereupon proceed to determine the taxpayer's correct net income, and make assessment or refund as the case may be; and said section provides further as follows:

"Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the Federal Government, within the time specified, shall be subject to all penalties, as provided in Section three hundred and thirty-six of this article, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change."

In the instant case the Federal Internal Revenue Agent adjusted the taxpayer's inventory values under the "last-in-first-out" method, with the result that "net additions to inventories" in the sum of \$4,770.34, claimed as a deduction by the taxpayer in 1940, was disallowed for 1940 and shifted to 1941, in which latter year it was allowed as a deduction. This adjustment of inventory values, with the consequent shifting of a deductible item from one year to another, had the effect of increasing the taxpayer's income for 1940 and decreasing it for 1941. Other adjustments by the Internal Revenue Agent for these two years affected the net amount of the Federal assessment for 1940 and the net amount of the Federal refund for 1941, but these other adjustments are not pertinent to the question under consideration, and this reference to them is all that is necessary. For present purposes we may assume that the assessment of additional tax for 1940 and the refund for 1941 were caused solely by the inventory adjustment.

The taxpayer failed to comply with Section 334 of our Revenue Act as to making report of the Federal correction of income within the time specified. Moreover, more than three years have elapsed since the due date of the 1941 return. Therefore, the question arises whether or not the taxpayer's right to an adjustment, with the consequent refund, for 1941 is barred by the statute of limitations. (Sections 334, 340 and 937).

It seems clear that the taxpayer's right in an independent action to recover an overpayment for 1941 is now barred. Three years have elapsed since the due date of the 1941 return without his making demand for refund (Sec. 937) or application for revision of such return (Sec. 340); and he failed to notify the Commissioner of Revenue under Section 334, thereby forfeiting his right to a refund which otherwise might have been revived under that section by the filing of the notice or new "return" with the Commissioner.

But 1941 is not the only year involved. The very change or correction which decreased the 1941 income also increased the 1940 income. Under these circumstances the taxpayer urges that it would be unconscionable for the State to take advantage of the 1940 increase of income and at the same time deny to the taxpayer any benefit from the 1941 decrease of income. He contends that he should be entitled to the 1941 benefit flowing from the Federal correction if the State claims the 1940 benefit flowing from the very same correction. He, therefore, contends that he is entitled to offset or credit his 1940 deficiency with the amount of a 1941 overpayment resulting from the same correction.

It is my opinion that the taxpayer's position can be sustained and that he may recoup his 1941 overpayment against his liability for additional 1940 tax. If the State were to institute an action against the taxpayer for the 1940 additional tax (instead of pursuing its special statutory remedies), the taxpayer could set up as a defense his right to recoup the

1941 overpayment and to credit the same against the 1940 additional tax; and such right of recoupment would not be barred by the statute of limitations. The reason for this is that the State's claim and the taxpayer's claim both arose out of the same transaction, *i.e.*, an inventory adjustment which gave birth simultaneously, and for the same reason, to both claims. It is not material that the taxpayer's right to assert his claim independently was barred by the statute of limitations. The important point is that his claim for refund arose out of the same transaction as did the State's claim, and this gave him the equitable right of recoupment, or credit of one claim against the other. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

It is true that the State in this case has not brought an action for recovery of the 1940 tax, and that there is, therefore, no action in which the taxpayer technically may set up his defense. However, the taxpayer's substantial rights should not be obliterated by procedural deficiencies, especially where, as here, the reason for the equitable defense of recoupment rests upon considerations of common decency and of sovereign morality. It would be unjust and immoral for the State to retain the taxpayer's money in this case. It would amount to a fraud upon his rights. Therefore, if he has an equitable defense which would be available in the event of an action by the State, that defense should not languish for want of a procedural vehicle.

The position I have taken is supported by ample authority. See *P-H Fed. Tax Service*, Sec. 20, 108. The leading case on the point is *BULL v. U. S.*, 295 U. S. 247, 79 L. ed. 1421 (1934), where post-death partnership profits were erroneously made the basis of an estate tax in 1921, and in 1925 were correctly determined by the Commissioner to be the basis of an income tax. The executor, who had previously paid the estate tax, paid the income tax under protest and sued to recover. The court held that even though an independent claim for refund of the estate tax was barred by the statute of limitations, nevertheless the taxpayer was entitled to recoupment and credit of the estate tax against the income tax.

A case more to the point is *CROSSETT LUMBER CO v. U. S.*, (CCA 8th) 87 Fed. (2d) 930, 18 AFTR 846 (1937). There the Commissioner of Internal Revenue erred in determining the value of the plaintiff's inventory of November 30, 1926. This had the effect of decreasing the taxpayer's 1926 taxable income and increasing his 1927 taxable income. Thus, the Commissioner's error resulted in an erroneous refund for 1926 and an erroneous over-assessment for 1927. The refund was credited to the taxpayer against a 1924 deficiency; and the taxpayer paid the over-assessment. When the error was discovered, the taxpayer sued to recover the 1927 over-assessment that he had paid in error. Even though the statute of limitations had barred an independent suit for recovery of the erroneous refund, the court held that the taxpayer was entitled to recoup said amount as a credit against his claim for the overpayment because both the refund and the overpayment arose out of the same transaction, a single erroneous inventory valuation which shifted a portion of inventory value from one year to another.

For the reasons stated herein, I am of the opinion that such part of the taxpayer's 1941 overpayment as resulted from the shifting of "net additions to inventories" as a deduction from 1940 to 1941, should be allowed as a recoupment and credit against Department's claim for additional 1940 tax resulting from the same change.

I am advertent to previous rulings of this office denying taxpayers' right to set off barred credits in one year against the Department's claim for additional tax in another year, when both resulted from Federal correction of income. Those rulings are distinguishable from the instant case in that the credit sought by the taxpayer and the tax deficiency did not arise out of the same transaction, and, therefore, the equitable doctrine of recoupment was not applicable. Because of this the taxpayers in those cases were compelled to rely on an alleged right or defense of "set-off," which, unlike equitable recoupment, is defeated by the statute of limitations. It is true that these previous rulings depend upon the theory that a refund does not lose its character merely by assuming the form of a credit against other tax liability instead of being actually paid directly to the taxpayer, and that even a "credit refund" can be barred by the statute of limitations. It is also true that Section 334 provides that if the taxpayer fails to notify the Commissioner of Revenue of the Federal correction of income, he "shall forfeit his rights to any refund due by reason of such change," which provision would work a forfeiture of "credit refunds" as well as others. But I do not construe this provision as working a forfeiture of rights which exist independently of Section 334. In my opinion, Section 334 has the practical function and effect of reviving a right already barred (or creating a new right to take its place) and that the forfeiture provision means simply that a taxpayer who fails to give the required notice forfeits any new or revived right which Section 334 otherwise might have given him. Indeed, the forfeiture is restricted by its express terms to a refund *by reason of such change*. If the taxpayer has the right to a refund (either in cash or credit) independently of Section 334, that right is not forfeited by failure to give notice of Federal correction of income. Thus, if the three-year statute has not barred the taxpayer's right to a revision of the original return under Section 340, or to a refund under Section 937, that right is not forfeited by failure to comply with Section 334. So it is with the equitable right of recoupment. Here the taxpayer has the right to recoup his barred refund as a credit against a tax deficiency of another year because both arose out of the same transaction. That does not make it any the less a "refund"; but it is a refund to which the taxpayer is entitled independently of Section 334, and it is not technically a "refund due by reason of such change," i.e., the *Federal change*. Rather, it is a refund due by reason of the fact that the State itself has made the change or correction on the State return. If the correction of a single item by the State results in an overpayment in one year and a deficiency in another year, the equitable right of recoupment arises; and this right is independent of Section 334 or of the Federal correction, and is not affected by the statute of limitations.

INHERITANCE TAXATION; TRUSTS; RESERVATION OF INCOME
FOR LIFE SUBJECT TO MORTGAGE

5 August 1946

You have submitted for my examination a "Living Trust Agreement," executed on April 29, 1937, by Robert H. Riggsbee and others, and you have requested me to advise you of my opinion as to whether or not a taxable transfer occurred at the death of Sallie A. Riggsbee under the circumstances hereinafter set out.

A. M. Riggsbee died seized of various tracts of real estate in Durham County. His estate was burdened with debt, and the real estate was sold at the courthouse door by Commissioners under an order of Court. At the sale said real estate was purchased for \$299,880.32 by Connell Realty & Mortgage Co., acting as agent for Wachovia Bank & Trust Company pursuant to previous arrangement between the bank and the heirs. Connell Realty & Mortgage Co. received title and in turn conveyed the same to the heirs, among whom was Sallie A. Riggsbee, whose interest is the subject of your inquiry. The heirs in turn conveyed said real estate to Wachovia Bank & Trust Co., Trustee, under the Living Trust Agreement dated April 29, 1937, the pertinent terms of which are substantially as follows:

(1) The trust was irrevocable, and was to endure for twenty years from the date thereof, at which time the property was to be distributed as thereafter provided; except that the shares of certain heirs, including that of Sallie A. Riggsbee, should remain in trust for the rest of their respective lives, after which such shares should be divided among certain designated persons, discharged of the trust.

(2) For the duration of the trust (or until the discharge of the indebtedness) all income should be applied to the mortgage indebtedness to the bank, representing the purchase price of the property.

(3) If the mortgage indebtedness should be paid off before the twenty-year period, one-half the income for the remainder of the period should accumulate and the other half should be distributed in stated percentages to the heirs (25% to Sallie A. Riggsbee "in quarterly installments, for the duration of her life or until the expiration of the trust;" if she should die during twenty-year period of trust, then such income to designated persons).

(4) At the expiration of the twenty-year period, the property should be distributed, discharged of trust, to the heirs; except that the shares of certain heirs should remain in trust for life as stated in (1) above; among such shares being that of Sallie A. Riggsbee: "If the said Sallie A. Riggsbee shall on April 29, 1957, be living, then her share herein shall continue to be held by the Trustee during the remainder of her life, and the net income paid to her quarterly by the said trustee"; and, at her death, to be divided, free of the trust, among designated persons.

Other provisions of the trust instrument appear not to affect the question involved in your inquiry and are, therefore omitted.

Sallie A. Riggsbee died September 19, 1945, during the twenty-year period of the trust. She had not received directly or in cash any of the income from the property since executing the trust instrument, all of said income having been applied to the reduction of the mortgage indebtedness, which is still unpaid.

The trustee (not the executor of Sallie A. Riggsbee) contends that, inasmuch as the trust was irrevocable, and inasmuch as Sallie A. Riggsbee neither expected nor received any income from the trust after she signed the trust instrument, she had no property or equity at her death which could constitute the subject of a taxable transfer at that time; that she conveyed her equity completely and irrevocably on April 29, 1937, and thereafter she had no interest in the property.

I am unable to agree with the Trustee. I am of the opinion that a taxable transfer clearly occurred upon Sallie A. Riggsbee's death. Section 1 of the Revenue Act imposes an inheritance tax "upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases:

"When the transfer of property made by a resident, or non-resident, is of real property within the State . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor, or *intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death, (a) the possession or enjoyment of, or the income from, the property . . .*" (Italics ours).

Under the terms of the trust instrument, Sallie A. Riggsbee retained for the period of her life the income from her share of the real estate. It is not material that such income was applied to the mortgage indebtedness. She received the benefit of such income as surely as if the trustee had paid the same to her to be repaid by her toward the reduction of her part of the debt. Therefore, it can be said that she actually received the income, or the benefit thereof in the form of a reduced indebtedness. Moreover, by the terms of the instrument she was to receive the income in cash for life after the discharge of the indebtedness. It is of no moment that her death intervened and prevented the realization of this provision. Neither is it important that she regarded her execution of the trust instrument as a relinquishment of any right ever to share in the material benefit of the property. It may be true that she realized that her pocket-book probably would never feel the weight of any money flowing from the property; but that does not mean that her interest in the real estate terminated for inheritance tax purposes.

It appears to me that the statute renders the trust instrument of April 29, 1937, as far as the interest of Sallie A. Riggsbee is concerned, a transfer "intended to take effect in possession or enjoyment at or after" her death, because of the fact that she retained the income for life. Such a transfer is taxable. Therefore, I am of the opinion that the interest of Sallie A. Riggsbee in the property must be deemed to have continued, for inheritance tax purposes, up to the moment of her death, and to have passed to those designated in the trust instrument at that time. Her interest would be valued, of course, as of the date of her death. This value would be determined by valuing her share of the property and reducing the same by her share of the remaining indebtedness.

To dispose of one more contention of the Trustee, I see no merit in the argument that the bank (trustee) furnished the money which was used to purchase the property for the heirs. I see nothing in that transaction ex-

cept a loan of money secured by the trust instrument. Once the loan was made the money belonged to the heirs, not the bank. The bank had then only a secured debt; and the only equity or interest it had in the property was that which it received as trustee under the trust instrument.

GENERAL ADMINISTRATION; INCOME TAXES; LIABILITY OF PARTNERSHIP
PROPERTY FOR TAXES OF INDIVIDUAL PARTNER

6 August 1946

In 1945 Victor B. Higgins, Jr., hereinafter referred to as the taxpayer, filed an individual income tax return showing approximately \$2,000 due in taxes. Accompanying the return was taxpayer's check for one-fourth of this amount. No further payments have been made. A warrant for the collection of the remainder of the taxes due was issued by you under paragraph 1, Section 913 of the Revenue Act. Neither the deputy collector nor the sheriff of the county in which the taxpayer resides was able to find any property belonging to taxpayer. However, it appears that taxpayer is a partner in a partnership located in Charlotte, N. C. You inquire if the taxpayer's interest in this partnership may be subjected to the payment of the taxes due by said taxpayer to the State of North Carolina.

G. S. 1-315 lists the property subject to sale under execution. This section is sufficiently broad to include the interest of an individual partner in partnership property. Prior to 1941 our Court held that the interest of an individual partner in partnership property was subject to sale under execution.

TREDWELL v. RASCOE, 14 N. C. 50.

BLEVINS v. BAKER, 33 N. C. 291.

MCPHERSON v. PEMBERTON, 46 N. C. 378.

In 1941 the General Assembly adopted the Uniform Partnership Act, G. S. 59-31. In paragraph (c) of subdivision (2) of G. S. 59-55 it is provided that a partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership. The method of reaching general partnership property for the satisfaction of a debt of an individual partner is specified in G. S. 59-58. This section provides for a charging order to be issued by the court when application is made by any judgment creditor. This charging order may charge the interest of the debtor partner with the unsatisfied amount of the judgment debt with interest, and may provide for the appointment of a receiver of the debtor partner's share of the partnership profits.

In my opinion, the method of reaching partnership assets for the satisfaction of the debt of an individual partner is specified above. While it is not necessary to determine whether that method is the exclusive method, I am of the opinion that as a matter of caution this method should be pursued. Out-of-state authorities, construing the Uniform Partnership Act, indicate that the method provided in said Act is the exclusive method of reaching partnership assets for the satisfaction of a debt of an individual partner.

See RADAR v. GOLDOFF, 228 N. Y. Supp. 453.

SHERWOOD v. JACKSON (Calif. 1932) 8 Pacific 2nd 943.

Your warrant for the collection of taxes issued pursuant to the authority granted in Section 913 of the Revenue Act does not, in my opinion, make

the taxpayer a judgment debtor within the meaning of G. S. 59-58. It is questionable whether the issuance and docketing of a tax certificate under Section 913 would make the taxpayer a judgment debtor within the meaning of G. S. 59-58. I am of the opinion that the safest course to pursue is to bring suit against the taxpayer, and as a part of the relief prayed in the suit, to request that the interest of the taxpayer in the partnership assets be applied toward the satisfaction of the judgment recovery.

TAXATION; SALES TAX; PREFABRICATED HOUSES

9 August 1946

You have requested my opinion as to whether a firm distributing prefabricated homes in North Carolina should collect and remit to the Department of Revenue the 3% sales tax on the sales price of such prefabricated homes. You particularly desire my opinion on the question of whether the distributor should be granted the right to pay the maximum tax of \$15.00 on a home rather than the 3% tax on each section of the home, and on the question of whether the exemption for rough and dressed lumber in Section 427 of the Revenue Act is applicable to such sections of the homes.

I enclose a copy of an opinion of the Attorney General to Messrs. Caudle and Nicholson, dated February 25, 1946, which in my opinion affords a complete answer to the first question upon which you desire specific information.

The opening paragraph of Section 427 of the Revenue Act reads as follows:

"There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used subsequent to June thirtieth, one thousand nine hundred thirty-nine, which shall enter into or become a part of any building or any other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof, *except rough and dressed lumber (but not millwork), brick or hollow tile, sand, gravel, crushed stone, rock and granite.*" (Italics added).

Lumber is defined in *McKINNEY v. MATTHEWS*, 166 N. C. 576, 579 as follows:

"There is a well marked distinction between the terms 'timber' and 'lumber'. The word "timber" has an enlarged or restricted sense, according to the connection in which it is employed. It may refer to standing trees or to stems or trunks of trees cut and shaped for use in the erection of buildings or other structures, and not manufactured into lumber within the ordinary meaning of the word "lumber." It does not ordinarily refer to the articles manufactured therefrom, such as shingles, laths, fence rails, or railroad ties. Lumber is timber sawed or split for use in building, that is, the manufactured product of logs."

It appears from the above quotation that when logs are sawed or split or cut in such a way that a new product results, this new product is lumber. When this new product remains in the state into which it is transformed so as to become lumber, it is rough lumber. This becomes obvious when the definition of dressed lumber is considered. Dressed lumber is defined by the Supreme Court of the United States in *United States v. Dudley*, 174 U. S. 670; 43 Law Edition, 1129 as follows:

"Ordinarily, the fact that an article in the process of manufacture takes a new name is indicative of a distinct manufacture, as was intimated in *TIDE WATER OIL CO. v. UNITED STATES*, 171 U. S. 210 [ANTE, 139] but we do not think it important in this case that 'dressed lumber' is divisible into flooring, sheathing, and ceiling, since sawed lumber is none the less sawed lumber, though in its different forms and uses it goes under the names of beams, rafters, joists, clapboards, fence boards, barn boards, and the like. In other words, a new manufacture is usually accompanied by a change of name. but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one thing only. So long as 'dressed lumber' is in a condition for use for house and ship building purposes generally, it is still 'dressed lumber'; *but if its manufacture has so far advanced that it can only be used for a definite purposes, as sashes, blinds, moldings, spars, boxes, furniture, etc., it becomes a 'manufacture of wood.'*" (Italics added).

I, therefore, advise that in my opinion the exemption in Section 427 of the Revenue Act of rough and dressed lumber is not broad enough to include the sections of a prefabricated house. From the enclosed opinion it appears that the distributor of prefabricated houses must pay a 3 per cent tax on each section of the house. He is not authorized to pay the maximum tax of \$15.00 on the completed house.

I do not believe it can be doubted that the sale of sections of a prefabricated house is a sale of tangible personal property as that term is used in the Sales Tax Article of the Revenue Act.

LICENSE TAXATION; SECTION 124; MENTALISTS AND ASTROLOGISTS

20 August 1946

You have requested my opinion as to whether an individual who practices mentalism and astrology in this State must apply for and secure from the Commissioner of Revenue a privilege license before practicing the above-mentioned arts.

By Section 124 of the Revenue Act, it is provided that any person, other than the persons mentioned in another portion of that section, who practices the art of palmistry, clairvoyance, and other crafts of a similar kind, shall apply for and secure a license from the Commissioner of Revenue.

I am of the opinion that the inclusion of the words "other crafts of a similar kind" is broad enough and was intended to cover a person practicing the arts herein mentioned.

INHERITANCE TAXATION; DEEDS; CONSTRUCTION

24 August 1946

You have requested that I advise you whether a life estate or an estate in fee simple is created by a deed reading, in part, as follows:

"THIS DEED, Made this the 2nd day of March, 1920, by MRS. SUSAN J. MATTHEWS of the County of Nash and State of North Carolina, of the first part, to MRS. CARRIE F. McCAULEY, and the children born of her body, of the County of Nash and State of North Carolina, of the second part.

"WITNESSETH: That the said party of the first part, in consideration of LOVE AND AFFECTION AND ONE DOLLAR, to her paid by the said parties of the second part, the receipt of which is hereby acknowledged, has bargained and sold and by these presents does grant, bargain, sell and convey to the said parties of the second part, their heirs and assigns, the following. . . .

"TO HAVE AND TO HOLD the aforesaid real estate and all privileges and appurtenances thereto belonging, to the said parties of the second part, their heirs and assigns, to their only use and behoof forever."

Mrs. McCauley recently died never having had a child. From the information I have been able to gather, it seems that the grantor in the above deed is now dead, and that she predeceased Mrs. McCauley. For the purpose of answering your question I shall assume that the grantor did predecease Mrs. McCauley.

I am of the opinion that the grantee in the above deed acquired a fee simple estate in the land conveyed by the instrument.

TATE v. AMOS, 197 N. C. 159.

CUNNINGHAM v. WORTHINGTON, 196 N. C. 778.

LEWIS v. STANCIL, 154 N. C. 326.

Under the above authorities, Mrs. McCauley and her children, born at the time of the execution of the deed, would take an estate in fee simple as tenants in common. Since there were no children born at that time, Mrs. McCauley, in my opinion, acquired the land in fee simple. Therefore, upon her death, the property descends to her heirs, and the inheritance tax should be computed on that basis.

INCOME TAXATION; EXPENSES OF GUARDIAN OR TRUSTEE IN MANAGING
ESTATE NOT BUSINESS EXPENSES UNLESS IN CONNECTION
WITH A BUSINESS

28 August 1946

Mr. Robert M. Gantt, attorney of Durham, N. C., has challenged the correctness of your position in the following matter, and has presented his contentions to me at some length. You have requested me to consider his contentions thoroughly, and to advise you of my opinion in connection therewith.

The pertinent facts are as follows:

C. C. McClees is the duly appointed, qualified and acting guardian of the estate of Thomas L. Shepherd, an incompetent, the son of W. T. Shep-

herd, who died March 29, 1939, leaving a last will and testament in which he left the residue of his estate to Durham Bank and Trust Company, as trustee for the benefit of his son, Thomas L. Shepherd, and his "granddaughter," Annie Moore Shepherd. The exact terms of the trust are not material to this inquiry.

Just prior to 1941 the trustee received intimations that Annie Moore Shepherd was not the grandchild of the testator, and, in fact, was not related to him by blood. Therefore, the trustee advised the guardians of the two beneficiaries that it must protect itself against liability by withholding further payments until the legal rights of Annie Moore Shepherd were judicially determined; whereupon John H. Shepherd, then guardian of Thomas L. Shepherd, instituted a proceeding in the Superior Court of Durham County against the trustee and against the guardian of Annie Moore Shepherd, alleging that Annie Moore Shepherd was not related to the testator, and that the testator had been misled into providing for her in his will. This proceeding terminated with a judgment decreeing that Annie Moore Shepherd was not the testator's granddaughter, but that the testator had not been misled, and had provided for her notwithstanding, by reason of love and affection; and that she was entitled to her full share of the estate as provided by the will. Costs were taxed against the estate of Thomas L. Shepherd, C. C. McClees, guardian, hereinafter referred to as the taxpayer.

The question is whether or not the court costs and attorneys fees paid by the taxpayer in prosecuting this proceeding are deductible from income under our Revenue Act.

Such costs and fees are not deductible unless they constitute "ordinary and necessary expenses paid during the income year in carrying on any trade or business" within the meaning of Section 322 (1) of the Revenue Act.

It appears to be well settled that legal expenses incurred by an individual for the purpose of establishing his rights to property or for the purpose of acquiring property are personal, and not business expenses. *SQUIER v. U. S.* (1937, D. C.) 20 F. Supp. 917. It seems equally clear that legal and other expenses incurred by an individual in the management of his own property or investments are personal, and not business, expenses. *HIGGINS v. COMMISSIONER OF INTERNAL REVENUE*, (1941) 312 U. S. 212, 85 L. ed. 783. This is true no matter how extensive the individual's holdings are, or how regular and continuous such management may be.

This principle has been applied to fiduciaries in the management of estates. Thus, in the absence of evidence showing activities coming within the general acceptance of the concept of carrying on a trade or business (such as renting real estate, farming, merchandising, etc.), an executor cannot be said to be carrying on a trade or business as executor merely because he conserves the estate by marshalling the assets for ultimate distribution. *U. S. v. PYNE*, (1941) 313 U. S. 127, 85 L. ed. 1231. Likewise, it has been held that an attorney's fee paid by a guardian for conducting litigation to secure income for his ward is not a business expense. *VAN*

WART v. COMMISSIONER OF INTERNAL REVENUE, 295 U. S. 112, 79 L. ed. 1336. In such case the ward, not the guardian, is the taxpayer. The guardian simply stands in the place of the ward. To the ward, as to any other individual taxpayer, these expenses are personal expenses in the absence of some evidence that they were incurred in connection with some activity constituting a trade or business.

Therefore, I am of the opinion that court costs and attorneys' fees expended for the purpose of establishing rights in property, or of managing or conserving property (whether they be expended by an individual in the conduct of his individual affairs or by a guardian or trustee in the management and conservation of an estate) are not business expenses within the meaning of our statute unless it appears that they were expended in connection with an activity which constitutes a trade or business. See *Anno.*, 88 L. ed. 177; 27 *Am. Jur.*, *Income Taxes*, Sec. 99; *P-H Fed. Tax Service*, 1946, Sec. 11,086.

I believe that this disposes of the taxpayer's contention that had the trustee, instead of the guardian, brought the suit, the trustee could have deducted these expenses. In my view of the matter, it is immaterial whether these expenses were incurred by the guardian or by the trustee. Even to the trustee the court costs and attorney fees would have been a personal, rather than a business expense; i.e., a "personal" expense of the estate. Cf., *STUART v. COMMISSIONER OF INTERNAL REVENUE*, 84 F. (2d) 368, 17 AFTR 1298 (1936).

That the expenses incurred by the taxpayer were non-business expenses seems to me to be too clear to call for further discussion. However, the taxpayer has submitted two documents which demand further analysis of the problem. One of these documents is a copy of an adverse opinion handed down by the Federal Tax Court in a case in which this taxpayer sought to establish his right under Federal law to deduct the very litigation expenses now under scrutiny. The other document is an affidavit which the taxpayer contends he was not permitted to use in evidence before the Federal Tax Court, and which might have prevented an adverse decision by the Tax Court. He urges that this affidavit contains information adequate to justify a decision under our Revenue Act contrary to that rendered by the Federal Tax Court.

The taxpayer's argument fails to take into consideration the difference between our Revenue Act and the Federal Act which controlled the decision in the Tax Court. Our Act permits a deduction for expenses only if those expenses are paid or incurred in carrying on a trade or business. So did the Federal Act, until 1942, when a new provision was added permitting a deduction for certain non-trade or non-business expenses paid "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." This new provision was designed to allow as deductions many expenses which theretofore had been disallowed by the Courts because they were not business expenses. See *HIGGINS v. COMMISSIONER OF REVENUE*, *supra*; *BINGHAM'S TRUST v. COMMISSIONER OF INTERNAL REVENUE*, 325 U. S. 365, 89 L. ed. 1670 (1944).

The taxpayer's case before the Tax Court was concerned with the question whether these expenses were *non-business* expenses under the 1942

amendment to the Federal Act. The Tax Court held that they were not deductible as non-business expenses because not incurred in connection with property already held by the guardian. It was never contended that they were *business* expenses. Inasmuch as they are not business expenses, they fail to meet the test of our Revenue Act.

The affidavit urged upon us by the taxpayer does not alter this result. As a matter of fact, I have used the substance of this affidavit in my statement of the facts. It was apparently offered by the taxpayer for the purpose of showing that the proceeding in which the expenses were incurred was encouraged by the trustee, and that the guardian instituted a proceeding which, in reality, was that of the trustee. The taxpayer thus tries to prove that this was the trustee's proceeding.

Such a showing, if the affidavit is sufficient to accomplish that purpose, may have been pertinent in the Tax Court, by serving the purpose of placing the expenses upon a person who was then holding and managing the property. This might have avoided the basis on which the Tax Court rendered its adverse decision; *i.e.*, that the guardian did not incur the expenses to conserve or manage property then held by him. However, the affidavit does not serve a similar purpose under our Revenue Act, which does not contain a similar provision. As far as *business* expenses are concerned, the affidavit serves no useful purpose. There is no profit in making any conjecture upon what effect the affidavit might have had upon the Tax Court's decision under a Federal provision which has no counterpart in our Revenue Act.

I conclude, therefore, that the expenses incurred by the guardian in obtaining judicial determination of his ward's legal rights in property, were not expenses incurred in carrying on any trade or business, and are not, therefore, deductible from income under the provisions of our Revenue Act.

INHERITANCE TAXES; INSURANCE; ESTATE OF LUCILLE WAY WYRICK

6 September 1946

You have requested me to advise you whether inheritance taxes are due on the proceeds of a policy of life insurance paid to the beneficiary under the following circumstances:

Lucille Way Wyrick (hereinafter referred to as the decedent) procured a policy of insurance on her own life, and Max Way, Jr., was named as beneficiary therein. The decedent paid all of the premiums due upon the policy, and upon her death the amount of the policy was paid to Max Way, Jr., the beneficiary. Max Way, Jr., is a nephew of the decedent.

The facts stated above were submitted by Hon. U. L. Spence, Attorney at Law, Carthage, N. C., and Mr. Spence has agreed to abide by the decision of this office since the amount involved is quite small. Mr. Spence refers in his letter to the case of *TRUST CO. v. MAXWELL*, 221 N. C. 528, and requests that that case be considered in reaching a conclusion.

I am of the opinion that *TRUST CO. v. MAXWELL*, *SUPRA*, is not controlling. That case was decided in 1942, and as a result of that decision Section II of the Revenue Act was rewritten. See *Public Laws* 1943, Chapter 400, Section I(c). As Section II is now written, it provides, among

other things, that the proceeds of life insurance policies received by any beneficiary other than the executor of the decedent are liable for inheritance taxes if the insurance was purchased with premiums or other consideration paid directly or indirectly by the decedent. Provision is made for the situation in which the decedent pays only a part of the premiums, and the situation in which he pays no part of the premiums but possesses certain incidents of ownership at the time of his death. In my opinion, the proceeds of the policy of insurance paid to Max Way, Jr., are taxable under Section II of the Revenue Act, referred to above.

Mr. Spence's expression of confidence in this office and in the Department of Revenue is most gratifying, and I hope that you will assure him that this question has been given very careful consideration.

INCOME TAXATION; RESIDENT'S INCOME FROM RESIDENT TRUSTEE OF ESTATE
WHICH RECEIVES INCOME FROM PARTNERSHIP IN ANOTHER STATE

6 September 1946

You have requested me to advise you of my opinion in the following matter, and you have submitted to me for this purpose your file, including a letter from Messrs. Taliaferro and Clarkson, attorneys for Mrs. Mary Grey Sabine, Hendersonville, N. C., hereinafter referred to as the taxpayer.

The facts appear to be as follows:

The taxpayer's father, a resident of North Carolina, died leaving a last will and testament. The chief asset of the estate is a hosiery mill in Bristol, Va., which is presently being operated as a partnership. The trustees under the decedent's will own a 93% interest in the partnership. Under the will, 38% of the testator's interest in said partnership was placed in trust for religious, charitable and educational institutions, and the remaining 62% of his interest was placed in trust for the payment of a few small annuities to several beneficiaries, with the balance of the income payable by the trustee to the testator's three children, of whom the taxpayer is one.

The attorneys for the taxpayer state that the Department of Revenue or Taxation of the State of Virginia has taken the position that inasmuch as this business is located and operates wholly in the State of Virginia, the income therefrom is taxable by the State of Virginia to the individuals who receive the same, and they have demanded that the taxpayer pay income taxes on her portion of the income to the State of Virginia.

The attorneys for the taxpayer contend that the taxpayer's income from the trust is not taxable in this State for the reason that the trustee is merely a "pipe-line" through which the income from the Virginia partnership is channeled to the taxpayer; and, therefore, that the taxpayer in this case receives income which is deductible under Section 322 (10) (b) of the Revenue Act, which reads as follows:

"Resident individuals having an established business or an investment in real or tangible property in another State or other States may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other State or States which levies or levy a net income tax. The de-

duction herein authorized shall not apply to income for personal services or income from any other source than an established business or real and/or tangible property owned in another State except to the extent provided in Section 325. Resident individuals who have an established business or investment in property in another State which does not levy an income tax on the income therefrom shall treat any income or loss from such business or investment as though it occurred from a business or investment in North Carolina."

I regret that I am unable to agree with the taxpayer's contention. The trustee and the beneficiary, taxpayer, must be regarded for purposes of income taxation under our Revenue Act as separate taxable entities; and the income which each receives must be regarded as coming within the definition of "gross income," as set out in Section 317 of the Revenue Act.

"Estates and trusts are frequently treated as separate entities for income tax purposes. And the tax on the income of the estate or trust is usually payable by the fiduciary, except in cases where the trust income is taxable to the beneficiaries or to the settlor," 27 *Am. Jur., Income Taxes*, Sec. 171. *LATTA v. JENKINS*, 200 N. C. 255.

"Express statutory provisions may permit the deduction, in computing the income tax of a decedent's estate or of a trust, of the amount of income distributable or distributed to the legatees, heirs or beneficiaries." 37 *Am. Jur., Income Taxes*, Section 174.

"The income of an estate or trust which is distributable or distributed to the beneficiaries, and is, therefore, deductible in computing the income tax of the estate or trust is usually taxable to the beneficiaries." 27 *Am. Jur., Income Taxes*, Section 176.

Thus, our Revenue Act recognizes the estate or trust as a separate taxable entity, and also permits the estate or trust what constitutes, in effect, a deduction as to that part of the income which has become distributable during the income year. Section 315 provides that the income tax is laid upon resident fiduciaries having in charge funds or property for the benefit of a resident of this state and/or income earned in this state for the benefit of a non-resident fiduciary having in charge funds or property for the benefit of a resident of this state, which tax shall be paid annually with respect to:

"(a) That part of the income of estates or trusts which has not become distributable during the income year."

Said section expressly imposes the income tax upon the fiduciary and provides that such tax shall be a charge against the estate or trust.

Therefore, it seems clear that for the purposes of income taxation in this State an estate or trust is a taxable entity separate and apart from the beneficiary of said estate or trust. As stated above, our definition of "gross income" is sufficiently broad to cover all the income received by the trustee as one taxpayer and by the beneficiary as another taxpayer. However, in order to avoid what constitutes, in effect, double taxation of the same income or money, our Legislature has written into the Revenue Act provisions which lay the income tax on the trustee for that part of his income which does not become distributable during the income year, and

which lay the income tax on the beneficiary as to that part of the income which becomes distributable by the trustees during the income year.

These provisions of our Revenue Act are in no sense a failure to recognize the separate taxable entities of the trust and of the beneficiary interest. These provisions, rather, are designed to achieve the practical effect of avoiding taxation of the same money twice. Technically, the income which flows into the hands of the trustee is not the same income which flows into the hands of the beneficiary. The trustee and the beneficiary being separate taxpayers, the income which they receive are separate incomes. The purpose of these provisions is similar to the purpose inherent in other provisions of the Revenue Act which allow a corporate stockholder to deduct from his income that part of his corporate dividends which corresponds to the proportion of corporate income on which the corporation pays income taxes to the State of North Carolina.

Inasmuch as the trustee and the beneficiary are separate taxable entities, it would seem to follow that in this case the beneficiary is not entitled to the deduction provided by Section 322 (10) (b) of the Revenue Act. If anyone in this case is entitled to a deduction under that paragraph, it would be the trustee who might be said to receive income from an "established business" in Virginia. But even the trustee would be entitled to a deduction only to the extent that such income is, in fact, reported for taxation in Virginia. It is my understanding that the trustee in this case distributes all the income in the same year in which it is received. In such case, the State of North Carolina would not levy a tax on the trustee on account of such income, but would levy a tax on the beneficiary on account of such income.

While I do not presume to pass upon the statutes of Virginia or upon the Constitutional rights of that State to tax, it would appear to me that Virginia's tax would lie against the trustee rather than against the beneficiary. Both the trustee and the beneficiary as separate taxable persons are residents of the state of North Carolina. The only one of these taxpayers who can be said to earn money in Virginia is the trustee who holds and owns the legal title to a share of the partnership business in Virginia. The beneficiary in this case owns no such share, but receives merely a part of the income from the trust estate. For this reason it would seem to me that Virginia would lay its tax against the trustee rather than against the beneficiary.

However, Virginia's right to tax and the manner in which she does so is a matter which lies between Virginia and the taxpayer, and is one which is of no concern to us. In any event, our tax is not determinable by whether or not the State of Virginia attempts to levy a tax upon the same income. Our tax necessarily must be determined by reference to our own laws.

For the reasons stated above, I am of the opinion that the taxpayer, who is the beneficiary of the trust in question and who receives her income from the trustee, is not entitled to the deduction allowed by Section 322 (10) (b) of the Revenue Act, because of the fact that she does not receive such income from an "established business" in another state.

INCOME TAXATION; CASUALTY LOSSES; LOSS OF ARMY UNIFORM
IN PLANE CRASH

9 September 1946

I have your letter of July 16, 1946, with reference to Lawrence Gold, Rocky Mount, N. C., hereinafter referred to as the taxpayer. The taxpayer is represented by Mr. Frank P. Meadows, Accountant, of Rocky Mount, N. C. It appears that in preparing his income tax return for 1943 the taxpayer deducted loss for uniforms and personal effects lost in two plane crashes. He contends that these were casualty losses, and are, therefore, deductible under Section 322 of the Revenue Act.

You have tentatively taken the position that inasmuch as the taxpayer's service pay was not taxable, and inasmuch as the uniforms were used only in connection with his duties as an Army pilot, such losses were not in reality a business expense, and not deductible because there is no taxable income from which such expenses can be deducted.

I am compelled to agree with the taxpayer that the loss of uniforms and personal effects in plane crashes is a casualty loss, and is, therefore, deductible under Section 322 (6) (b), which provides as follows:

"Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise."

It seems to me that is immaterial that such casualty losses were incurred by the taxpayer while he was engaged in earning a non-taxable income. The taxpayer is not contending that these losses are business expenses, but that they are casualty losses. I agree with you that there could be no deductible "business expense" incurred in the production of a non-taxable income. On the other hand, a casualty loss does not depend for its character upon the question whether or not the taxpayer is engaged in business. As a matter of fact, the provision quoted above expressly contemplates losses which are not in connection with a trade or business. I do not believe that the deduction in this case would be defeated merely because the taxpayer was engaged in a "business" from which he derived a non-taxable income. In my opinion, the statute speaks of losses not connected with a trade or business, the income from which, if any, would be taxable. The loss in question was not connected with a trade or business, the income from which was taxable; and it was a casualty loss. Therefore, I am of the opinion that it is deductible.

INCOME TAXATION; CONFEDERATE WIDOW'S PENSION NOT TAXABLE INCOME

9 September 1946

This is in reference to your letter of July 16, 1946, relative to the income tax return of Mrs. Eliza M. Murdock, Salisbury, N. C. It appears that Mrs. Murdock is the widow of a Confederate veteran, and that she included as income in her 1945 return the sum of \$393.25, representing "Confederate widow pension."

You have requested me to advise you of my opinion as to whether or not pensions paid by the State of North Carolina to widows of Confederate veterans are taxable income.

Pensions paid by the State of North Carolina to widows of Confederate veterans, as such, are not awarded as compensation for services rendered to the State by the widows. Therefore, such pensions are mere gifts or gratuities.

Section 317 of the Revenue Act expressly excludes from "gross income" the value of property acquired by gift.

Therefore, I am of the opinion that such pensions are not taxable income.

This view is in accord with one expressed by the Federal authorities relative to pensions paid by the United States Government to widows of soldiers. See *P-H Federal Tax Service*, 1946, Section 7663.

INCOME TAXATION; TAXABILITY OF SOUTHERN HIGHLAND
HANDICRAFT GUILD, INC.

10 September 1946

You have requested me to advise you of my opinion relative to the taxable status of Southern Highland Handicraft Guild, Inc., and you have submitted for my examination the charter of this corporation, together with correspondence from Mr. W. Bowen Henderson, Certified Public Accountant of Asheville, North Carolina.

An examination of the charter of this corporation fails to reveal what disposition is to be made of the assets of the corporation upon its dissolution. Article VIII of the charter provides that the period of existence of the corporation shall be twenty (20) years.

Upon the expiration of the charter of a corporation, the directors hold the assets as trustees, first for the creditors, and secondarily for the stockholders in good standing at the time of the expiration of the charter. This rule applies not only to corporations having capital stock and organized for purposes of profit, but also to non-profit, non-stock corporations. In the case of a non-profit, non-stock corporation, the members are considered stockholders insofar as their rights to the corporate assets are concerned. *Smith v. Dicks*, 197 N. C. 355. Upon dissolution, the assets, after payment of creditors, are divided among the stockholders; it does not revert to the creditor; nor does it revert to the State. *WILSON v. LEARY*, 120 N. C. 90.

I see nothing in the charter of this corporation to prevent a distribution of assets among the members upon dissolution of the corporation. The assets at that time may be the result of accumulating earnings over the whole period of existence.

However, if the corporation is a bona fide non-profit, educational organization, I am of the opinion that the exemption should not be denied merely because the stockholders or members may share in the assets upon dissolution. See *P-H Federal Tax Service*, 1946, Par. 4337; and *COMMISSIONER OF INTERNAL REVENUE v. MISS HARRIS' FLORIDA SCHOOL, INC.*, (CCA 5th, 1940), *P-H Federal Tax Service*, 1941, Par. 62473. It appears to me that distribution of corporate assets to members upon dissolution

would not, of itself, place a corporation among those whose earnings are said to inure to the benefit of the members. On the other hand, the likelihood of an early distribution of assets among members should be regarded suspiciously, for it may be used as a device to escape taxation. If you should find in any case that early dissolution is employed as a device to escape corporate taxation, you should deny the exemption on the ground that the organization is not bona fide.

There is nothing in the charter of the instant corporation which indicates to me that such a device is being employed. Therefore, in the absence of information to the contrary, I conclude that none of the net earnings inures to the benefit of any private stockholder or individual.

The only remaining question is whether or not the corporation is organized for "educational" purposes within the meaning of Sections 314 (3) and 322 (9) of the Revenue Act.

An examination of the charter reveals that the general purpose is to gather information and to instruct members in the development and conservation of the handicrafts in the Southern Mountains. In my opinion, the purposes of the corporation are educational.

I am advertent to the corporation's power to maintain and manage retail outlets for the sale of products of members. This seems to me to be an incidental part of the principal purpose and in furtherance thereof. I do not regard this additional activity as converting the corporation into a business organization, especially inasmuch as all profits resulting therefrom are applied to the general purposes of the corporation. See *P-H Federal Tax Service*, Par. 4330, and Par. 4332.

Therefore, I am of the opinion that this corporation is exempt from the payment of income taxes; and, further, that contributions to said corporation are deductible by the donors to the extent permitted by Section 322 (9).

LICENSE TAXES; MOTOR ADVERTISERS; SECTION 151½, CONSTRUCTION OF

12 September 1946

You have requested that I advise you whether an individual should apply for and obtain the license required by Section 151½ of the Revenue Act before engaging in the following activity:

The individual, a resident of South Carolina, desires to come to Fairmont, North Carolina, and use a sound truck to advertise a horse race which is to be held at Myrtle Beach, South Carolina. This horse race is to be given for the farmers of the two states, and no admission is to be charged. Only one trip into North Carolina is contemplated by this individual.

You also inquire if a refund is due when the tax has been paid and the taxpayer has engaged only in the above outlined activity.

I am of the opinion that when only the activity outlined above is engaged in, no tax is due under Section 151½ of the Revenue Act. If a tax has been paid under such section for the performance of such activity, I am of the opinion that the taxpayer is entitled to a refund.

Section 151½ of the Revenue Act reads, in part, as follows:

"Every person, firm, or corporation operating over the streets or highways of this state any motor vehicle or other mechanical conveyance equipped with radio . . . or having any loud-speaker attachment . . . to produce sound effects for advertising purposes, *whether advertising his or its own products or those of others*, shall be deemed a motor advertiser . . ." (Italics added).

It should be noted that the statute is made all inclusive by the terms first employed. Therefore, unless the clause italicized above is construed as restricting or limiting the broad terms first employed, the clause is meaningless. It should not be assumed that the General Assembly has done a vain and useless thing or has employed language which is meaningless and adds nothing to this statute in which it appears. *MITCHELL v. BOARD OF EDUCATION*, 201 N. C. 55, 58. It follows, thus, that the italicized clause should be construed as restricting the broader terms therefor used, and Section 151½, as so construed, is applicable only to those who advertise their "own products or those of others," by the use of sound truck, etc.

It is seen that the statute covers only those who advertise "products." the word "product" imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses. *ELDER v. STATE*, 162 Ala. 41, 50 So. 370; *WHITE v. BARNEY*, 43 F. 474. When the term "product" is thus construed, I do not believe that a person who advertises a horse race is advertising a "product" within the meaning of Section 151½.

SALES AND USE TAXATION; FEDERAL SAVINGS AND LOAN ASSOCIATION
NOT EXEMPT FROM SALES TAX

12 September 1946

In view of my recent opinion to the effect that sales to national banks are not subject to our sales tax, you have requested my opinion as to whether or not sales to Federal Savings and Loan Associations are likewise exempt. Specifically, your question is whether or not retail sales to Federal Savings and Loan Associations are exempt under Section 406 (c) of the Revenue Act, which reads as follows:

"The gross receipts from sales of tangible personal property which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

My opinion that sales to national banks were exempt from the sales tax under the above-quoted paragraph was based on the theory that a national bank is a Federal instrumentality on which an excise tax cannot be directly laid by the State; and while our tax may not be a direct tax upon the consumer, there is a possibility that the United States Supreme Court might consider such a tax to be one upon the consumer, and, therefore, prohibited in the case of a sale to a national bank. Inasmuch as your practice had been to exempt sales to national banks on this theory, I con-

cluded that such sales were not taxable. It is true that Federal Savings and Loan Associations are likewise instrumentalities of the Federal Government; and, therefore, are free from State taxation except to the extent permitted by Congress. STATE OF MINNESOTA FEDERAL SAVINGS AND LOAN ASSOCIATION (Minn. 1944) 15 N.W. (2d) 568. However, in this case Congress has expressly given a limited power of taxation to the States. The Home Owners' Loan Act, 12 USCA, page 519-20, Section 1464H, provides, in part:

"and no State, Territorial, County, Municipal or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar mutual or co-operative thrift and home financing institutions."

Thus, it seems clear that North Carolina may impose tax on Federal Savings and Loan Associations, if the same tax is imposed on other similar associations; and I conclude, therefore, that Federal Savings and Loan Associations do not fall within the exemption of Section 406 (e) of the Revenue Act.

INHERITANCE TAXATION; COMPUTATION OF TAX WHERE TESTATOR PROVIDES
THAT TAX SHALL BE PAID BY HIS ESTATE WITHOUT
DEDUCTION FROM SPECIFIC LEGACY

16 September 1946

You have requested me to advise you of my opinion as to the proper method of computing inheritance tax where a testator provides in his will that all inheritance taxes shall be paid by his executor out of the general funds of the estate, and that a specific legacy shall not be reduced thereby, the purpose being to give the legatee the exact amount of the legacy named, free and clear of inheritance tax.

This question can be more readily understood if we use a hypothetical case. For example, a testator leaves his nephew a legacy of \$1,000, and directs that the inheritance tax due on such legacy shall be paid from his residuary estate so that the nephew shall receive the \$1,000 without liability for inheritance tax thereon. The rate of tax in this case would be four per cent. You wish to know whether the tax would be computed upon \$1,000 or upon some larger amount.

Our inheritance tax is a charge against each distributive share of the estate according to its value, and against the person entitled thereto. 28 *Am. Jur., Inheritance, etc., Taxes*. Section 278. It is not a property tax, but a tax upon the right of succession to property, imposed upon the person who has that right. *In re Morris Estate*, 138 N. C. 259. However, it is competent for a testator to specify what property or class of property shall assume the burden of the tax, and he can direct that inheritance taxes upon a legacy be paid out of the residuary estate or out of any other fund or part of the estate. 28 *Am. Jur., Inheritance, etc., Taxes*. Section 280; Anno., 141 ALR 848; 142 ALR 1140. But when the testator provides that inheritance taxes upon a legacy be paid by the executor out of the

residuary estate or other part of the estate, the effect is to increase the gift, for in such case the legatee receives not only the named legacy, but also an economic gain through the testator's discharge of a legal obligation of the legatee, i.e., the tax. *Helvering v. Bruun*, 309 U. S. 461, 84 L. ed. 864. Therefore, it seems to be the established rule that where a testator bequeaths a specific legacy and directs that the inheritance tax be paid out of the residuary estate, the tax is calculated, not upon the specified amount alone, but upon the specified amount plus such an amount that, after the tax is calculated on the total and deducted therefrom the legatee will receive the specified amount free from tax. *Bouse v. Hutzler*, (Md., 1942) 26 A (2d) 767; *In re Irwin's Estate*, 196 Cal. 366, 237 P. 1074, 1077; *In re Levalley's Estate*, 191 Wis. 356, 210 N. W. 941; *In re Bowlin's Estate*, 189 Minn. 196, 248 N. W. 741; *In re Henry's Estate*, 189 Wash 510, 66 P. (26) 350; 61 C. J. *Taxation*. Sec. 2589. In other words, the taxable value of the legacy is an amount on which the tax can be computed and which, when reduced by the amount of such tax, will equal the specified amount of the legacy.

The foregoing rule is applied to the instant case as follows:

Since the tax here represents 4% of the total taxable value, the net amount left for the legatee is 96%. Thus, in this case the \$1,000 represents 96% of the total taxable value. If 96% equals \$1,000, 1% equals \$10.4166, and 100% equals \$1,041.66. This last figure is the total value of the gift; and 4% of this figure is \$41.66, which is the amount of the tax. Deduction of the tax from the total value of the gift leaves \$1,000, which is the net amount of the legacy after satisfaction of the tax.

SHELBY COTTON MILLS, CHARLOTTE, N. C.

17 September 1946

Under date of August 2, 1946, I expressed in writing an opinion to the effect that, despite the statute of limitations, such part of the above-named taxpayer's 1941 overpayment of income taxes as resulted from the shifting of "net additions to inventories," as a deduction, from 1940 to 1941, should be allowed as a recoupment and credit against the Department's claim for additional 1940 tax resulting from the same change.

My opinion was based on the equitable doctrine of recoupment, which I deemed to be applicable because of the fact that the State's claim and the taxpayer's claim both arose out of the same transaction, i.e., the shifting of the same item from one year to another, increasing tax liability in one year and reducing it in the other.

You have observed the possibility that my opinion may not be consistent with one expressed in 1944 by Mr. Adams relative to depreciation deductions claimed by Cannon Mills Company; and you have requested me to examine Mr. Adams' opinion, together with a brief filed by Gardner, Morrison & Rogers, Attorneys, and to advise you of my opinion as to whether or not my present opinion is at variance with the position taken by you in that case.

I have examined carefully both Mr. Adams' opinion and the able brief of Messrs. Gardner, Morrison & Rogers, and it seems clear to me that my present opinion is not at variance with your former position.

In the first place, Mr. Adams denied the taxpayer's claim on the ground that the Commissioner had allowed as "reasonable" a depreciation basis which the taxpayer had claimed, and that the taxpayer's right to reopen this question should be denied because no request for revision had been made within the three years as required. Thus, the taxpayer's claim of overpayment of tax for prior years was not established; the taxpayer had no overpayment which he could use as a recoupment against present taxes; and it was, therefore, unnecessary for Mr. Adams to decide whether or not the doctrine of equitable recoupment was applicable to these facts.

In the second place, even if Mr. Adams had concluded that an overpayment of taxes had occurred in the prior years, thereby rendering necessary a consideration of the doctrine of equitable recoupment, it seems clear that he would have concluded that the doctrine had no application to that case. For the doctrine of equitable recoupment to be applicable, it must appear that the opposing claims arose out of the same transaction. While a vigorous argument was made in the brief filed by the attorneys for Cannon Mills Company, it seems clear to me that the doctrine of equitable recoupment has no application to that case. The two claims involved in that case clearly did not arise out of the same transaction. The taxpayer, in my opinion, was seeking to offset against a present income tax liability an asserted (but not established) claim of overpayment upon a transaction having no connection whatever with his present tax liability.

Therefore, I am of the opinion that my present ruling does not represent a departure from views heretofore expressed by this office. I have withheld my opinion from distribution pending a determination of this question. Please advise me if you desire a conference before I release said opinion.

LICENSE TAXATION; SECTION 130; PHONETTES AS MUSIC MACHINES

26 September 1946

You have requested me to advise you of my opinion in the following matter:

Section 130 of the Revenue Act imposes a license tax on the operation of "any machine or machines which plays or produces music." Said section imposes an annual operator's license of \$100.00 and in addition thereto an annual state-wide license of \$10.00 "for each machine."

The question is whether or not the devices hereinafter described are music machines within the meaning of Section 130.

It appears that the devices in question are small coin-operated loud speakers which are placed in restaurants and other similar establishments, individually in booths and at intervals along the counters. Upon depositing a five-cent coin the depositor may hear six minutes of continuously transcribed music. The device, or box, in question has the following words printed or stamped thereon:

"Personal Music — Six Minutes of Continuous Music — The Equivalent of Two Complete Records — This Machine Can Be Heard in Your Immediate Area Only — 5c"

It is not clear whether or not the "machine" bearing the foregoing words is the exact machine in question. Said machine appears to be made by Personal Music Corporation, Newark, New Jersey. Another such machine appears to be made by Michigan Phonette Corporation, New York City. The opinion which I express herein is based on the assumption that there is no essential difference between the two machines, and that both operate upon the same principle.

The music which is ultimately heard by the customer in the eating establishment originates in a studio which is removed some distance from the establishment. In the studio the taxpayer operates a "studio amplifier dual automatic phonograph." The automatic phonograph is dual in order to provide continuous music. The music, which is picked up from transcriptions by the phonograph, is transmitted over directly connected telephone wires to the telephone exchange, and from there the sound is relayed and transmitted over separate wires to the various eating establishments. In the eating establishment the sound is received over the individual telephone wire by a "master power supply unit" which amplifies said sound and, in turn, transmits such sound to the individual "Phonettes" or "machines" located on the counters and in the booths.

In some cases an eating establishment, instead of receiving sound over telephone wires from a studio which supplies several eating places, maintains on its own premises a "hide-away automatic phonograph," which supplies the music to the "master power supply unit," which, in turn, amplifies and transmits the music over wires to the individual "machines," or coin-operated loud speakers, in the individual booths and along the counters.

It appears that the coin-operated device in question is no more than a personal and individual loud speaker which operates only upon the insertion of a coin. It has no power except that derived by direct wire connection from the "master power supply unit" in the eating establishment. It appears further that all the coin-operated devices in a single establishment are connected with and are upon what is known as as "common circuit." It appears further that this "common circuit" never extends outside the single eating establishment.

Under the facts stated above, I am of the opinion that the taxable "machine" is the "master power supply unit" by which means all of the coin-operated devices are connected on a "common circuit"; and that the individual coin-operated loud speakers on the counters and in the booths are not separate music machines within the meaning of the statute.

BEVERAGE CONTROL ACT; STATUTE OF LIMITATIONS

26 September 1946

You have requested me to advise you whether or not in my opinion the right of the Commissioner of Revenue to make assessments under Schedule F of the Revenue Act (Beverage Control Act) is barred by any statute of limitations.

After a careful search, I am unable to find any express statutory provision which could operate as a statute of limitations against the Commissioner's right to assess or collect taxes under the Beverage Control Act.

This office has previously expressed the opinion that no statute of limitations applies to the Commissioner's right to assess and collect taxes under Schedule B — License Taxes; and Section 523, which is a part of the Beverage Control Act, provides that the Commissioner "shall have and exercise all the rights, duties, powers and responsibilities in enforcing this Article that are enumerated . . . in Schedule B . . ."

It seems to be well established that no statute of limitations runs against the State acting in its sovereign capacity, unless it is expressly so provided in the statute; although a different rule may apply where the State acts in other than its sovereign capacity. G. S. 1-30; *WILMINGTON v. CRONLEY*, 122 N. C. 388 and 122 N. C. 383; *CHARLOTTE v. KAVANAUGH*, 221 N. C. 259.

Our Court recognizes the assessment and collection of taxes as a sovereign function, and holds that despite G. S. 1-30 the statute of limitations does not apply in such cases in the absence of express language to that effect. *WILMINGTON v. CRONLEY*, supra; *CHARLOTTE v. KAVANAUGH*, supra; *NEW HANOVER COUNTY v. WHITEMAN*, 190, N. C. 332.

Accordingly, I am of the opinion that there is no statute of limitations which bars the Commissioner's right to assess and collect taxes under the Beverage Control Act, which is Schedule F of the Revenue Act.

INCOME TAXATION: GAIN OR LOSS FROM INVOLUNTARY SALE: GAIN OR LOSS
WHERE PROCEEDS OF SALE RETAIN CHARACTER AS REAL ESTATE

27 September 1946

You have requested me to advise you of my opinion relative to certain questions raised by Mr. George C. Hampton, Jr., Attorney at Law, Greensboro, North Carolina, in his letter to you under date of July 11, 1946. Mr. Hampton is hereinafter referred to as the taxpayer.

It appears that in January, 1944, the taxpayer was appointed guardian of one Sarah Saferight, an incompetent who had been residing at Guilford County Home since about 1909. Prior to taxpayer's appointment as guardian, Guilford County had instituted proceedings to sell a tract of land owned by this incompetent, pursuant to which a Commissioner sold the land under order of Court and realized net proceeds, after payment of expenses, costs and fees, of \$8,137.20. After the taxpayer's appointment as guardian he received this sum from the Commissioner by order of Court. Thereafter the guardian incurred certain costs and expenses defending two actions, both on account of Guilford County taxes.

Sarah Saferight died in October, 1945, and the taxpayer was appointed administrator of her estate, whereupon he transferred \$7,223.95 to his account as administrator. Since then he has paid certain administrative expenses, including attorney's fee for handling the litigation mentioned above, and funeral expenses. After payment of all expenses and costs there will be approximately \$3,170.00 for division among the heirs.

The taxpayer does not know when the land in question was acquired by Sarah Saferight, or at what cost, although such land seems to have been purchased by her prior to 1909 (the year she entered Guilford County Home) at a cost considerably less than \$8,137.20, the net amount of

proceeds of sale. For purposes of expressing an opinion on the matter, I shall assume that the land was purchased prior to 1909, and was sold about 1942 at a price above its original cost, or above its fair market value as of 1921, as the case may be.

The question is whether or not taxpayer has realized a taxable capital gain under the above facts.

This question appears to me to be separable, under the taxpayer's statement of facts, into the following two specific questions:

(1) Is a taxable gain realized in a case where, as here, the sale is made under a Court order without the owner's consent, and is, therefore, involuntary?

(2) Is a taxable gain realized in a case where as here, the proceeds of sale are treated under the law, for purposes of division among heirs, as "real estate"?

The fact that a sale of property is forced, rather than voluntary, does not affect the question whether or not a capital gain results. Taxable capital gains have been held to result from foreclosure sales and from sales under orders of Court in condemnation proceedings, and from tax sales. *HELVERING v. HAMMEL*, 311 U. S. 504, 85 L. ed. 303; *HELVERING v. NEBRASKA BRIDGE SUPPLY & LUMBER CO.*, 312 U. S. 666, 85 L. ed. 1111. See also *P-H Federal Tax Service*, 1946, Par. 4968-A, 4968-B, 4971, 4971-A. Therefore, in my opinion the fact that the incompetent's land was sold under order of Court without her consent, does not prevent a taxable gain. The sale must be considered, for this purpose, as if made by the owner voluntarily.

In my opinion, the fact that the proceeds of sale inherited their character as "real estate" from the land which was sold is not pertinent to the question whether or not a taxable gain resulted from the sale. For income tax purposes there was clearly a sale of land from which a gain was realized. The treatment of the proceeds of involuntary sales as "real estate" has the narrow purpose of determining the property rights of persons therein. Its effect must be confined to that purpose. It does not alter the fact that a sale was made at a gain.

Therefore, it appears to me that a taxable gain has been realized in this case. The amount of that gain is determinable by the provisions of Section 319 of the Revenue Act. Inasmuch as this property was purchased prior to 1921, the "cost basis" would be the fair market value as of 1921, if the actual cost cannot be ascertained.

From the taxpayer's statement of facts, one other question is implied: whether or not expenses, costs and fees paid by the guardian and administrator are deductible from the capital gain or from income.

It seems clear that such expenses, costs and fees are not deductible from income in this case because they were not "ordinary and necessary expenses paid during the income year in carrying on any trade or business." Instead, these expenses, costs and fees were "personal" expenses of the estate. I see no need to discuss this point further, in view of my rather lengthy discussion of the same in an opinion under date of August 28, 1946.

USE TAXATION; SALES TAX CREDIT; SALES TAX PAID TO ANOTHER STATE
WITH RESPECT TO PROPERTY PURCHASED THEREIN FOR
USE, ETC., IN NORTH CAROLINA

28 September 1946

You have requested my opinion on the question of whether or not a sales tax, paid to another state with respect to property purchased therein, should be allowed as a credit on the use tax to be collected in this state, when the property is brought into this state to be used or consumed.

More specifically, you inquire if the 2% excise tax, paid to the State of Maryland for the issuance of an original certificate of title for a motor vehicle therein, should be allowed as a credit on the North Carolina use tax on that motor vehicle, when it is brought into this state for permanent use.

As originally enacted (1939, C. 158), the Compensating Use Tax contained the following provision (Section 802):

"Where a retail sales or use tax has already been paid with respect to said property *either in this or another* state by the purchaser thereof then the amount of said tax shall be credited upon the tax imposed by this article." (Italics added).

The above-quoted provision is the only reference in the original use tax article to a credit being allowed for a sales tax paid. As thus written, the credit was obviously allowed for a sales tax paid to North Carolina or to any other state with respect to the purchase of the property which became subject to the North Carolina use tax. However, in 1941 (1941, C. 50) the paragraph of the Revenue Act quoted above was rewritten to read as follows (Section 802):

"Where a retail sales tax has already been paid with respect to said property *in this State* by the purchaser thereof, then the amount of tax shall be credited upon the tax imposed by this article." (Italics added).

The abovementioned change is not the only one effected by the 1941 General Assembly with respect to the credit to be allowed on the use tax for a sales tax already paid on the property to be used. After omitting from Section 802 the general credit allowed for a sales tax paid in another state the Legislature of 1941 again inserted a credit for sales tax paid in another state, *but only in limited instances*. After providing that retailers engaged in business in this state shall collect the use tax, Section 805 authorizes a credit on the use tax due this state to the extent of a sales tax paid in another state, when the property is delivered directly to the purchaser in the state in which the sales tax is paid for storage, use or consumption in this state.

Upon a comparison of the 1939 and 1941 enactments, the conclusion that the General Assembly intended to allow as a credit on the use tax only the sales tax paid to this state becomes ineluctable. The magic of lexicography should never be applied to defeat the intention of the Legislature. The intent of the Legislature is the guiding star in the construction of

statutes. *UNEMPLOYMENT COMPENSATION COMMISSION v. INS. CO.*, 215 N. C. 479. When the statute is unambiguous it must be applied as written. *IN re ESTATE OF POINDEXTER*, 221 N. C. 246.

The statute being thus clear and unambiguous, it should be applied by state officers and agencies as written, since it is presumed to be constitutional and valid. *BICKETT v. TAX COMMISSION*, 177 N. C. 433.

Since, however, this question is presented for the first time for decision, it may not be amiss to consider its validity from a constitutional standpoint. In my opinion, the question is no longer a completely open one in North Carolina. In holding valid the original use tax, imposed upon the owners of motor vehicles, which provided for an exemption therefrom of a sales tax paid on the purchase of the motor vehicle in this state with no exemption for an out-of-state sales tax paid, the Supreme Court of North Carolina in *POWELL v. COMMISSIONER OF REVENUE*, 210 N. C. 211, said:

"It must be conceded that if the tax levied discriminates against the plaintiff by reason of the fact that he purchased his automobile outside of the State, such a discrimination would be violative of the aforesaid regulatory and uniformity provisions of the Federal and State Constitutions. *WELTON v. MISSOURI*, 91 U. S. 275, 23 L. ed., 347. The plaintiff contends that the remission of the tax upon the furnishing of a certificate from a licensed motor vehicle dealer in this State to the effect that the sales tax had been paid, gives rise to a discrimination against him by reason of the fact that the tax is collected upon his automobile bought in Virginia and not collected (or is "remitted") upon automobiles bought in North Carolina. However, in this connection, it must be observed that if the plaintiff, instead of purchasing his automobile in Virginia, had purchased it from a North Carolina dealer, under the provisions of the Revenue Act, he would have been required to pay to the dealer when he purchased his automobile exactly the same amount of tax as he, when he applied for the registration of his automobile bought in Virginia, was required to pay for the privilege of using the streets and highways of the State. The amount of tax exacted upon the North Carolina bought and the Virginia bought automobile is the same, namely, \$10.00. There is no discrimination in so far as the amount of the tax is concerned."

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"When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself 'to avoid, in effect, double taxation' on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination when there is equality."

Would the application of the statute as construed herein result in a violation of the Federal Constitution insofar as out-of-state purchases are concerned? While this is still an open question, its answer was adumbrated

in *HENNEFORD v. SILAS MASON CO.* (1937) 300 U. S. 577 81 L. ed. 814. There it was said:

"Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

Note observations in *SOUTHERN PACIFIC CO. v. GALLAGHER* (1939) 306 U. S. 167, 83 L. ed. 586.

In an article by Thomas Reed Powell in 53 *Harvard Law Review*, 909, 930-931, the following appears:

"This has a bearing on the still technically open question whether a use tax which permits the deduction of local sales taxes must grant the same credit for extra-state sales taxes imposed when the article was the subject of an extra-state local purchase. It is hard to see why it should. If the state imposes a use tax and no sales tax, there is not even the formal semblance of discrimination against interstate commerce, since there is no deduction for any other tax anywhere. The conjunction of a use tax with a deductible local sales tax has exactly the same effect as a general use tax without a sales tax. Hence the combination affords no justification for an insistence that a use tax that is complementary to a sales tax must give credit for extra-state sales taxes if it gives credit for domestic ones."

In annotations in 129 ALR 222, 230 and 153 ALR 609, 615, there appear three Ohio cases which have held valid a use tax containing an exemption for property on the purchase of which the Ohio sales tax has been paid and containing no similar exemption for sales tax paid outside the state.

The following observation is found in 47 *Am. Jur., Sales and Use Taxes*. Section 46:

"There are indications pointing to ultimate adoption of the view that a use tax law does not discriminate unconstitutionally against interstate commerce even though it makes an exemption with respect to articles upon which the domestic sales tax has been paid, but extends no corresponding exemption to goods which, after purchase outside the state and payment of a sales or use tax in the jurisdiction of purchase, are brought into and used within the state. At this writing, however, the Supreme Court of the United States has not yet committed itself definitely on that question, although it has expressed the view that a state use tax act which imposes an excise on the consumer for the storage, use, or other consumption in the state of tangible personal property purchased from a retailer does not discriminate against interstate commerce where the rate of the tax is the same as that of the state retail sales tax, and property covered by such sales tax is exempt from the use tax."

I, therefore, advise that, in my opinion, no credit should be allowed on the North Carolina use tax for a sales tax paid outside North Carolina on account of the purchase of the property to be used, etc., herein, except when the property is delivered by a North Carolina retailer directly to the

purchaser outside of this state and a sales tax is paid to the state of delivery. Credit should be allowed on the North Carolina use tax for a sales tax paid to North Carolina on account of the purchase of the property to be used, etc., herein. This construction will not result in an unconstitutional application of the statute.

INHERITANCE TAXATION; DEDUCTIONS; COST OF BURIAL LOT

1 October 1946

You have requested me to advise you of my opinion as to whether or not you should allow as a deduction in the computation of the taxable value of an estate the cost of purchasing a burial lot. In the particular case which you have in mind the estate has been valued at approximately \$400,000, and the representatives of the estate, with the consent of the beneficiaries, contemplate the erection of an expensive mausoleum to contain the body of the decedent. The lot on which such mausoleum is to be built will also cost a comparatively large sum of money.

Section 7 of the Revenue Act allows as deduction "reasonable funeral and burial expenses." In my opinion burial expenses include those expenses which are incurred in the purchase of a burial lot. See 28 *Am. Jur., Inheritance, Estate and Gift Taxes*, Section 248.

Therefore, it appears to me that the only question in any particular case which may cause difficulty is that which relates to the amount of money proposed to be expended for the lot. The statute requires such amount to be "reasonable." What is reasonable will depend in a given case upon the particular facts and circumstances of that case. Certainly the size of the estate bears upon the question. However, it appears to me that in deciding whether or not an amount is reasonable you should be influenced to some extent by the fact that the Legislature has already declared to be reasonable, as far as monuments are concerned, the sum of \$500.00. I am of the opinion that the deductible cost of a burial lot should bear some reasonable relationship to the deductible cost of the monument to be placed thereon. However, it is not my intention to state this as an inflexible rule, for the particular facts of a given case may justify the purchase of a burial lot at a cost which is not in proportion to the maximum sum allowed as a deductible cost for the monument.

In any event, the determination of the question whether or not a particular amount is reasonable is one for administrative determination.

INHERITANCE TAXATION; COMPUTATION OF TAX ON RESIDUARY ESTATE OR RIGHT TO RECEIVE INCOME THEREFROM

3 October 1946

You have referred to me a letter from Mr. I. S. Bull, Secretary and Trust Officer of Wachovia Bank & Trust Company, Winston-Salem, N. C., and have requested me to advise you of my opinion upon the matters contained therein.

In her last will and testament, Ida Hardy Pegram made several specific devises and bequests and then left the residue of her estate to Wachovia Bank & Trust Company, as trustee, with direction that the entire net income be paid to her foster son, Francis Hardy Pegram, for life, and that the corpus of the estate thereafter be distributed to other persons.

The will also provided that all inheritance and estate taxes should be paid by the executor out of the testators' general estate.

Upon these facts you wish me to advise you whether or not, in my opinion, Mr. Bull's method of computing inheritance tax on the life interest of Francis Hardy Pegram, in the residuary estate, is proper.

It seems that both you and Mr. Bull agree that the inheritance taxes upon the *specific* devises and bequests are to be deducted from the value of the residuary estate prior to computation of inheritance tax on the residuary estate. Under date of September 16, 1946, I expressed the opinion that, when inheritance tax upon a specific legacy is payable out of the residuary estate, the effect is to increase the value of the specific legacy, and the taxable value of the legacy is the specified amount plus an amount which will yield the specified amount to the legatee after deduction of a tax computed upon the total amount. If the effect of such a provision is to increase the specific gift, its effect also is to decrease the residuary estate, for the specific gift gains exactly what the residuary estate loses. Therefore, it is my opinion that the value of the residuary estate clearly should be reduced by the amount of inheritance taxes paid upon the *specific* devises and bequests, i.e., devises and bequests other than the residuary estate.

But, if I understand Mr. Bull's letter correctly, he contends that in determining the value of a life estate in the residuary estate, the value of the residuary estate should be further reduced by the estimated amount of inheritance taxes on the residuary estate itself (although he would add such estimated tax back to the value of the life estate prior to computation of exact tax). It appears that in this particular case he would compute the tax in the following manner:

(1) *Estimate* the amount of inheritance tax upon Francis' "life estate," i.e., his right to receive the income of the residuary estate for life. "This is a tentative figure since the tax cannot be accurately deducted until it has been computed."

(2) Deduct this estimated tax from the total value of the residuary estate.

(3) Using this result as the taxable value of the whole residuary estate, compute the value of Francis' life estate therein.

(4) To the value of the life estate ascertained in this way, add back the estimated tax. This is the taxable value of Francis' life estate, on which the tax is then computed accurately.

I must confess some difficulty in understanding Mr. Bull's argument. If it means what it seems to me to mean, he would deduct a tax from a gift before the amount of such tax can possibly be known. If we simplify the instant case by ignoring the "life estate" and by treating the residuary bequest as being an outright gift to one person, I do not believe that Mr. Bull would contend that an estimated tax on the gift should be deducted before the tax itself is computed. As a matter of fact, in his own example he adds the estimated tax back to the value of Francis' interest before computing the actual tax. Therefore, it seems that Mr. Bull's contention is

not to be construed to be a simple proposition to the effect that the proper method in any case is to reduce the taxable value of a gift by first deducting an estimated tax from the gift. Such a proposition would necessarily fail, for the inheritance tax on a gift is computed upon the full value of that gift, without deduction of any estimated tax thereon. The taxable value of a legacy is not reducible by the taxes due thereon. The tax is computed as if it is to be paid in cash by the legatee, rather than paid from the legacy itself. The inheritance tax is levied upon the legatee, not the legacy.

If Mr. Bull's contention does not mean that a gift must be reduced by an estimated tax thereon prior to computation of actual tax, what does it mean? The interpretation of another person's argument is always fraught with risk; but it seems to me that Mr. Bull is contending that the value of a "life estate" in property cannot be determined without first reducing the total value of the property by the amount of estimated tax *upon the life estate*; although the estimated tax is added back before computation of actual tax.

It appears to me that such an argument permits the presence of a life estate and remainder (rather than an outright gift) to confuse the issue unnecessarily. The problem is not different from that which arises in the case of a specific legacy. The problem is simply one of computing the tax upon the total value of the gift, without deducting any taxes thereon, estimated or otherwise. Under the particular facts in this case the problem is simply one of computing the tax upon the value of the "life estate," or the right to receive the income for life. This "life estate" or right to receive income is nothing except a part of the whole gift. I think it has been made clear that where the whole gift is given outright to one person, the whole gift is not first reduced by estimated taxes thereon. So, where a *part* of the gift is given, the whole is not reduced by estimated taxes on the part before discovering what that part is. A life estate in property, therefore, is to be valued without deducting from the value of the whole property the estimated taxes upon the life estate. The right to receive the income from \$1,000, for example, must not be valued as if it were the right to receive the income from some smaller figure. It is true that actually the income will be derived from a smaller figure, because inheritance taxes will reduce the \$1,000 to something less than that amount. But it is also true that a specific legacy of \$1,000 is likewise reduced, insofar as net gain to the legatee is concerned, for the legatee must pay the tax. The point is that the gift in such case is always reduced after, not before, the tax is computed; or, to put it another way, the value of the gift is not reduced until the tax has been computed. It is immaterial whether the gift be an outright gift of the whole property or a life estate in the property. Just as the whole property is used as the basis for computing tax on one gift so the life estate in the whole property is used as the basis for computing tax on the other gift; and no deduction of tax is to be made before such basis is determined.

It seems possible that Mr. Bull may have drawn an erroneous conclusion from the fact that the testatrix in this case provided that her general estate should bear all inheritance and estate taxes. In other words, his argument may be founded upon the assumption that the testatrix had elected to bear the burden of all such taxes, and the beneficiary, therefore,

should not be taxed upon an amount which included the sums which the executor must withdraw from the estate and pay as taxes; and, therefore, that such taxes should be deducted from the total estate before actual taxes are computed.

The fallacy of such an argument seems to me to be in a failure to understand the true nature of inheritance taxes. Such taxes are levied upon the *person who receives the property*. Such taxes are his own liability. No provision in the will can change this liability, which is fixed by law. Such liability is not shifted from the beneficiary by a testamentary provision that such taxes shall be paid by the executor out of the general funds of the estate. This is true whether the tax be one upon a specific legacy or one upon the residuary estate. In the case of a specific legacy the effect of such a provision is simply to transfer from the residuary estate to the specific legacy enough money to increase the specific legacy to the point that the legatees can pay the tax and still have exactly the specified amount of the legacy. Such a transfer reduces the residuary estate to the same extent that it enriches the specific legacy. In short, there is nothing in the transaction but a shift of money from one gift to another so as to increase one and decrease the other.

In the case of a residuary bequest such a provision does not have even this effect, for there is no "transfer" of money from one gift to another. The tax is paid out of the gift itself, and in such case the gift is neither increased nor decreased thereby. The residuary estate becomes like a specific legacy which must bear its own tax burden. As far as the taxable value of the residuary estate is concerned, a provision that inheritance taxes be paid out of the residuary estate is without effect.

Therefore, a testamentary provision that the residuary estate shall bear all inheritance taxes does not affect the taxable value of the residuary estate at all insofar as inheritance taxes *on the residuary estate itself* are concerned. Even without such a provision the residuary estate, like any other bequest, must bear the burden of its own inheritance taxes. The liability for the tax is upon the beneficiary, and his share of the estate stands as security for the tax. The taxable value of the share is the same whether the tax be paid from the share or from the beneficiary's pocket. If the executor pays the tax out of the share, as the law requires him to do, the effect, of course, is to reduce the share; but such reduction occurs *after* the tax is computed, not before.

If we bear in mind that the inheritance tax is upon the beneficiary rather than the estate, and that no testamentary provision will alter this rule of law, the problem becomes relatively simple, for it then becomes apparent that the taxable value of the residuary estate may be determined as if the beneficiary had paid the tax from his pocket; and if he has paid the tax from his pocket, it becomes equally apparent that he cannot deduct it from the taxable value of his share.

Thus, it seems to me that the only time the residuary estate is first reduced by inheritance taxes is when such taxes are upon the transfer of property other than the residuary estate, but are payable out of the residuary estate; and even in this case the value of the other gift is increased to the same extent, so that the taxable value of all the property transferred by the will remains undiminished.

I am cognizant of the possibility that I have not fully understood the basis of Mr. Bull's argument; and I shall be glad to consider any further argument that he cares to make on the question. However, upon the basis of my understanding of his contentions, I am unable to agree with him, and advise that in my opinion the method of computation suggested by him is not proper.

INCOME TAXATION; DEDUCTIONS; GIFTS OF WAR BONDS BY CORPORATION
To ITS EMPLOYEES

3 October 1946

You have referred to me a letter dated July 20, 1946, from Hon. Richard E. Thigpen, attorney for Carolina Rim & Wheel Co., Charlotte, herein-after referred to as the taxpayer, and have requested me to advise you of my opinion on the question arising therefrom.

It appears that the taxpayer on February 2, 1942, through its Board of Directors adopted a motion by which "it was agreed to promote the sale of War Bonds by inaugurating a pay roll deduction plan, and to encourage same the Company agreed to match, from its funds, the purchases of the employees with Bond, or Bonds, or Stamps in like amount."

The North Carolina Unemployment Compensation Commission, under date of February 20, 1942, advised the taxpayer "that the bond that you give to the employe free of charge and purchased by the company is not taxable, as in our opinion, the same is a gift made for a patriotic motive and without relationship to the performance of services."

The particular question which you present to me is whether or not the taxpayer's expenditures for War Bonds for its employees are deductible from gross income as ordinary and necessary expenses under Section 322 of the Revenue Act.

I am of the opinion that such expenditures are not deductible as ordinary and necessary expenses. It appears to me that the taxpayer's position is foreclosed by the fact that such expenditures are "without relationship to the performance of services."

I am cognizant of the U. S. Treasury rulings cited by the taxpayer. See *P-H Federal Tax Service*, 1946, Paragraphs 11,018 and 11,018-A; also the full statement of the attitude of the Bureau of Internal Revenue in *P-H Federal Tax Service*, 1942, Paragraph 66,313, which are to the same effect as the rulings cited by the taxpayer. In my opinion these rulings are not controlling in the instant case. They dealt with the deductibility of expenditures for advertising the war effort. The basis for the rulings was that there was a reasonable relationship between such advertising cost and prospective patronage. It was made clear that if the amount expended was so large as not to be reasonably directed to securing or maintaining public patronage, it would be disallowed. It is true that some expenditures for advertising among employees were allowed; but only those expenditures which were reasonably calculated to speed production and increase efficiency. Such advertising bears a reasonable relationship to the carrying on of the business and the production of income.

In the instant case the War Bonds purchased with the company funds were gifts to the employees; and they had no relationship to the services performed. I am unable to see that such purchases bore any reasonable relationship to the carrying on of business or the producing of income. Without such relationship they cannot be considered ordinary and necessary business expenses. It is not enough that the taxpayer's motive was a laudable one or that its patriotic action assisted the war effort.

For the reasons set out above, I am constrained to express the opinion that the taxpayer's expenditures for War Bonds as gifts to employees are not deductible as ordinary and necessary business expense.

INCOME TAXATION; GROSS INCOME; INSURANCE PROCEEDS

10 October 1946

You have requested me to advise you of my opinion with respect to whether or not your interpretation of Section 317 (2) (a) of our Revenue Act should be affected by the fact that on May 16, 1946, the U. S. Treasury amended its Regulation 111, Section 29.22 (b) (1)-1.

This question cannot be understood without an explanation of the administrative and judicial history which culminated in the amendment of May 16, 1946. Therefore, I shall attempt to outline in chronological order the events which led to this amendment.

Section 22 (b) (1) of the Internal Revenue Code provides that the following shall not be included in gross income and shall be exempt from income taxation:

"(1) *Life Insurance*.—Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or otherwise (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income)."

Prior to 1940 the Treasury Department promulgated, under the above-quoted provision (or one substantially like it), a regulation which read in part as follows:

"While it is immaterial whether the proceeds of a life insurance policy payable upon the death of the insured are paid to the beneficiary in a single sum or in installments, only the amount paid solely by reason of the death of the insured is exempted. The amount exempted is the amount payable had the insured or the beneficiary not elected to exercise an option to receive the proceeds of the policy or any part thereof at a later date or dates. If the policy provides no option for payment upon the death of the insured, or provides only for payments in installments, there is exempted only the amount which the insurance company would have paid immediately after the death of the insured had the policy not provided for payment at a later date or dates. Any increment thereto is taxable."

This regulation then set out in detail how it should be determined what part of each installment represented exempt insurance proceeds and what part represented taxable increment. For example, (a) where the insurer

has agreed to distribute either the increment, or the proceeds of insurance *and* the increment, until both are exhausted, the increment shall be included in gross income, (b) where the proceeds are payable in installments for a fixed number of years, or for a fixed number of years and continued life, the amount which would have been payable immediately at the insured's death (if the policy had so provided) shall be amortized over the fixed number of years, and the excess of each installment above this amortized amount shall be included in gross income, (c) where the proceeds are payable for the beneficiary's life, the amount which would have been payable at the insured's death is amortized over a number of years to be determined by the beneficiary's life expectancy, and the excess above the amortized amount is to be included in gross income.

It is plain from this regulation that the Treasury Department took the position that, *regardless of what the policy provided*, each policy was to be treated as payable immediately upon the death of the insured, and that only the amount payable in a lump sum at the insured's death was exempt. All above this amount-payable-at-death was considered increment after the insured's death and, therefore, taxable income. It made no difference that the policy provided only for installment payments, and not for a lump sum payment. It made no difference whether the option to elect installment payments in lieu of a lump sum payment was exercised by the insured during his lifetime or by the beneficiary after the insured's death. In every case the Treasury Department took the position that the policy had to be translated into a definite amount payable at the death of the insured; and all sums over and above that amount was "increment" and, therefore, taxable. In other words, the Department reached the conclusion that the Federal Revenue Acts "exclude from gross income only the principal sum of the capital value of a life insurance policy, as of the time of the insured's death, and do not exclude any amounts which are added to the principal sum (when it is paid in installments) by reason of the running of time." *P-H Fed. Tax Service* 1940, Par. 8220.

On July 10, 1940, the Circuit Court of Appeals, First Circuit, decided *COMMISSIONER OF INTERNAL REVENUE v. WINSLOW*, 113 F. (2d) 418, 25 AFTR 386. In that case the facts were substantially as follows: the policy provided that the beneficiary should receive fifty installments of \$2,000 each, and that said installments should not be commuted or cashed without the consent of the insured. Under the foregoing regulation, the Commissioner of Internal Revenue contended that the commuted value of the policy (i.e., the cash amount which would have been payable in a lump sum if the policy had so provided) was \$53,000, and that only this amount was exempt as "life insurance," the rest being "increment." The Court disagreed with the Commissioner, and held that the entire \$2,000 installment each time was exempt under the statute, i.e., that \$100,000 was exempt. The reason for the Court's decision was that all of each installment constituted "amounts received under a life insurance contract paid by reason of the death of the insured." This case established the proposition that where the *insured*, before his death, exercises his option to make the policy payable in definite installments, the entire amount of all such installments are exempt under the Federal statute, even though the aggregate amount of such installments is more than the amount which would have been payable at the insured's death.

This decision was followed by others to the same effect. *COM'R. v. BARTLETT*, (CCA 2d) 113 F. (2d) 766; *COM'R. v. BUCK*, (CCA2d), 120 F. (2d) 775; *ALLIS v. LA BUDDE*, (CCA 7th) 128 F. (2d) 838; *KAUFMAN v. U. S.*, (CCA 4th) 131 F. (2d) 854.

Apparently as a result of these decisions, the Treasury Department amended its regulation so as to make it apply only where it is the *beneficiary* who exercises an option, after the insured's death, to take the proceeds in installments.

The regulation as thus amended was subsequently tested in *COMMISSIONER OF INTERNAL REVENUE v. PIERCE*, (CCA 2d, 1944) 146 F. (2d) 388, 33 AFTR 387. There the policy granted three options which could be exercised by the insured, or, if the insured failed to elect, then by the beneficiary. The insured failed to elect the method of payment; so, after his death the beneficiary elected to take under "Option C" which gave the right to have the net proceeds of the policy paid in a fixed number of installments. The Commissioner contended that since it was the *beneficiary*, rather than the insured, who had the option of choosing between the principal and one of the options, it was as though the beneficiary had actually received the principal and had reinvested it with the insurer; and that the resulting payments thereafter had to be broken down into earnings and amortization installments. The Court rejected this idea and held that the entire amounts of the installments were exempt, regardless of the fact that the beneficiary could have received the proceeds in a lump sum and deliberately elected to take it in installments aggregating, over a period of time, a larger amount. Although such installments do actually include company earnings, concealed therein, nevertheless the entire amount is "paid by reason of the death of the insured"; and on this basis the courts have drawn a distinction between such installments and those cases wherein the company retains the capital sum for a season undiminished and pays only the interest to the beneficiary. *UNITED STATES v. HEILBRONER*, (CCA 2d) 100 F. 2d 379.

It was held that *separate* interest payments were taxable under the parenthetical provision of the Federal statute to the effect that if the insurance proceeds are held by the insurer "under an agreement to pay interest thereon, the interest payments shall be included in gross income."

Under similar facts the Circuit Court of Appeals for the third circuit on March 29, 1946, in *LAW v. ROTHENSIES*, *P-H Federal Tax Service* 1946, Par. 72,425, reached the same conclusion, i.e., that when a beneficiary elects, pursuant to an option granted by the policy, to take the insurance proceeds in installments rather than in a lump sum, all of said installments are exempt on the ground that they are "paid by reason of the death of the insured"; and it is not material that the aggregate installments are a greater amount than a lump sum payment would have been. This recent decision followed others of a similar character, rendered in the meantime by the Tax Court. *MYRA H. PRITCHARD*, *P-H Fed. Tax Service*, Par. 44,341, Memo T. C.; *KATHLEEN E. PAUL*, *P-H Fed. Tax Service*, Par. 45,021, Memo T. C.; *LOLA G. BULLARD*, 5 T. C. 1346.

The force of all these decisions was sufficient to cause the Commissioner finally to abandon his position that a part of such installment payments are taxable. Accordingly, on May 16, 1946, the Commissioner amended his

regulations by striking out all those provisions which sought to break down such installments into "insurance proceeds" and "increment" and which sought to tax the latter. By the same amendment he inserted a provision that "it is immaterial whether the proceeds are received in a single sum or otherwise." Thus ended the Commissioner's struggle with the courts on this point.

It should be observed at this point that the decisions hereinbefore discussed exempt only that interest which is concealed in an installment which is absolutely and definitely payable under the terms of the policy and which is not contingent in any way upon company earnings. Such decisions relate to those cases where the exact amount of the installment is known or ascertainable by computation at the insured's death. Interest or dividends which are paid *as such* are still taxable. For instance, if the insurer retains the entire capital sum for a "season, undiminished," (i.e., for a period without paying out any of the capital sum) and pays *interest only* to the beneficiary, such interest payments are taxable. This is the situation contemplated by the parenthetical provision of the Federal statute. *UNITED STATES v. HEILBRONER*, *supra*, and *COMMISSIONER v. PIERCE*, 146 F. (2d) 388. Or, if the insurer pays "dividends" whose amount is determined by current company earnings, such "dividends" are taxable, even if added to a regular installment. *PIERCE v. COMMISSIONER*, 2 T.C. 832. Or, if the policy states that the fixed installments are based upon an assumed rate of interest of 3%, and that the fixed installment will be increased by an "excess interest dividend" if the company earns more than the assumed rate of 3%, the "excess interest dividend" is taxable. *COM'R. v. WINSLOW*, 113 F. (2d) 418. 25 AFTR 386.

These separately identified "interest" and "dividend" payments are not regarded as being received "by reason of the death of the insured." They are, rather, earnings upon an investment; earnings which have accrued since the insured's death. They are earnings which are paid, not by reason of the insured's death, but by reason of the fact that the company's retention of the funds was a profitable investment. It must be conceded that the distinction between these earnings and those concealed in an installment is formal; but the courts have considered it justified by the statutory language, and the distinction now seems to be settled. *COMMISSIONER v. PIERCE*, 146 F. (2d) 388; *KINNEAR v. COMMISSIONER*, 20 B.T.A. 718; *COMMISSIONER v. WINSLOW*, 113 F. (2d) 418. As was said in *WINSLOW v. COMMISSIONER*, 39 B.T.A. 373 at pp. 378 and 379:

"This was a distribution out of the earnings of the corporation appropriately called in the bond an 'excess interest dividend.' While it was paid by virtue of the corporation's contractual obligation, it was a gain to petitioner currently derived from the principal invested. In its essential nature it resembles the earnings held taxable in *HEILBRONER* and *KINNEAR*, *SUPRA*. This 'excess interest dividend' was not received solely 'by reason of the death of the insured,' as was the \$2,000; it was paid also by reason of the withholding of the future installments of the principal amount and their profitable investment in the corporation. Thus, they are not squarely within the statutory exemption, and are like any other income from an investment."

It may be possible to draw a distinction between an "excess interest dividend," whose payment and amount are contingent upon company earnings, and an interest payment which is absolutely payable at a certain and definite rate of interest upon a known sum of money. Such distinction would rest upon the theory that, where the interest payment is uncertain, it is paid, not by reason of the insured's death, but by reason of company earnings after the insured's death; that this is not true of an interest payment absolutely and certainly payable at a fixed amount irrespective of company earnings; and that the only reason the latter interest payments are taxable is that the parenthetical provision of the statute expressly provides that they shall be taxable.

However, I am by no means convinced that such a distinction is valid. Although the courts have said that the parenthetical provision of the statute covered a case where the entire sum was left with the company for a season undiminished and interest only was paid to the beneficiary, they have also implied that the underlying reason for taxing interest payments under those circumstances was that such interest was not paid "by reason of the death of the insured." In other words, it appears that, notwithstanding the fact that the statute expressly makes taxable one kind of interest payment, the essential reason for its taxability is the same as the reason for taxing another kind of interest not expressly mentioned, and that fundamentally there is no distinction between an "excess interest dividend" and "interest" definitely payable at a fixed rate where all the proceeds are retained by the insurer: neither is paid "by reason of the death of the insured."

(See *P-H Federal Tax Service*, 1946, paragraphs 8216, 8218, 8220, 8220-C; and *CCH Federal Tax Reporter*, paragraphs 89, 90, 91).

The provision in the N. C. Revenue Act which is the counterpart of Section 22 (b) (1) of the Internal Revenue Code, is Section 317 (2) (a), which excludes from gross income the following:

"The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured."

I believe that your question now can be understood: should the Federal amendment of May 16, 1946, affect your interpretation of Section 317 (2) (a) of our Revenue Act? Essentially your question is whether or not you should place upon our provision the same interpretation that the Federal Courts have placed upon the Federal provision. It is my opinion that you should, for the reason that there is no essential difference between our provision and the Federal provision, and for the further reason that I believe the reasoning of the Federal Courts to be sound.

It is true that the language of our statute is not the same as that of the Federal statute. My conclusion that there is no essential difference between the two statutes has been aided by the legislative history of the Federal statute. The following appears to be the chronological development of the Federal statute:

Section II B of the Tariff Act of 1913 read: "... the proceeds of life insurance policies paid upon the death of the person insured ... shall not be included as income." It will be observed that this language is similar

to that employed by the North Carolina statute. Congressional records show that the member in charge of the bill in the House explained that "It was never contemplated to tax the proceeds of life insurance policies."

Section (4) (B) of the Revenue Act of 1916 exempted the proceeds of life insurance policies paid to individual beneficiaries upon the death of the insured. This was enlarged in 1918 to include the estate of the Insured.

The 1921 Act changed the exemption to read "The proceeds of life insurance policies paid upon the death of the insured."

Thereafter the 1926 Act, Section 213 (b) (1), read as follows:

"(1) Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or in installments (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income)."

With respect to the use of this language the Report of the Senate Finance Committee states:

"Section 213 (b) (1): Under existing law, the proceeds of life insurance policies paid upon the death of the insured are exempt. The House bill, in order to prevent any interpretation which would deny the exemption in the case of installment payments, amended this provision so that proceeds 'paid by reason of the death of the insured' would be exempt. In order to prevent an exemption of earnings, where the amount payable under the policy is placed in trust, upon the death of the insured, and the earnings thereon paid, the committee amendment provides specifically that such payments shall be included in gross income."

To the same effect is the statement accompanying the conference report to the House of Representatives:

"Amendment No. 17: Under existing law, the proceeds of life insurance policies 'paid upon the death' of the insured are exempt. The House bill, in order to prevent any interpretation which would deny the exemption in the case of installment payments, amended this provision so that proceeds 'paid by reason of the death' of the insured would be exempt. In order to prevent an exemption of earnings where the amount payable under the policy is placed in trust upon the death of the insured and the earnings thereon paid, the Senate amendment provides specifically that such payments shall be included in gross income."

The 1934 Act, Section 22 (a) (1) changed the phrase "or installments" to read "or otherwise." The reason for this is found in the Senate Finance Committee Report:

"This change, made by the House, makes it clear that the proceeds of a life insurance policy payable by reason of the death of the insured in the form of an annuity are not includible in gross income. . . ."

In my opinion this legislative history shows that Congress did not intend to change the meaning of the original language used in 1913. With minor differences the original language is like that in our own statute. It appears to have been the purpose of Congress each time, not to work a change in

the exemption, but to develop and crystallize its legislative intent, and to express that intent in such a way that misinterpretation might be avoided. Thus, it is my opinion that the present Federal statute means exactly what its predecessors meant, and that the various amendments constitute no more than an amplification of original Congressional intent to exclude insurance proceeds from gross income. These changes in language appear to me to be a development of the idea of what constitutes "insurance proceeds." For instance, as finally developed, "insurance proceeds" include payments under an insurance policy either in a lump sum or in installments or in the form of an annuity. But they do not include interest payments where the insurance company retains the entire capital sum of the policy for a season undiminished.

It was in 1926 that Congress made the broad changes in language. Whereas the law prior to that time had exempted "the proceeds of life insurance policies paid upon the death of the insured," the 1926 Act exempted "amounts received under a life insurance contract paid by reason of the death of the insured." However, it seems clear that no change in meaning was intended. As the Court said in *COMMISSIONER OF INTERNAL REVENUE v. WINSLOW*, 113 F. (2d) 418, at 423:

"It is clear that Congress intended that the words 'amounts received under a life insurance contract paid by reason of the death of the insured' in the 1926 Act and the words 'proceeds of life insurance policies paid upon the death of the insured' in the former statute should have the same meaning and were to be exempt from taxation."

The 1926 Act went still further by providing specifically (1) that such amounts should be exempted, "whether in a single sum or in installments," and (2) that "if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income."

It seems clear also that Congress intended, not to change the existing law by these two additional provisions, but to define with more exactness the insurance proceeds regarded as being exempt under existing law. A further example of this evolution of definition is the 1934 amendment which substituted the words "or otherwise" for the words "or in installments"; which made it clear that insurance proceeds in the form of an annuity are likewise exempt.

So, it appears to me that, as a practical matter, the history of the Federal legislation may be explained by saying that Congress, in the original statute, exempted proceeds of life insurance and that the subsequent amendments have undertaken to define proceeds of life insurance.

Having concluded that the present Federal statute has the same meaning as its forerunners, which used language similar to that still found in our own statute, I am constrained to say further that, in my opinion, our statute should receive the interpretation which the courts have placed upon the Federal statute—not because the Federal decisions are controlling as to our statute, but because, in my opinion, such decisions appear to me to state the correct rule.

Therefore, it is my opinion that our statute should receive an interpretation which will give the following legal results:

(1) "Proceeds of life insurance policies," include proceeds paid in one lump sum after the insured's death, because they are paid "upon the death of the insured," or, as the Federal statute expresses it, "by reason of the death of the insured."

(2) "Proceeds of life insurance policies" include all sums which are paid by the insurer in installments pursuant to a definite, certain and absolute liability to pay such sums under the policy; and it is immaterial that such installments include concealed interest or earnings which are added because of partial retention of the funds by the insurer after the death of the insured. It is also immaterial that the insurer or the beneficiary elected, by the exercise of an option in the policy, to receive the money in installments rather than in a lump sum aggregating less money. The exercise of a policy option to receive the proceeds as an annuity (i.e., in installments of principal plus interest) is not like the case where the beneficiary has no such legal right or option under the policy, but agrees independently of the policy to leave his money with the company for payment as an annuity. The exercise of an option is a right under the policy, a right with whose creation the beneficiary had nothing to do. He simply indicates a choice; he then receives his installments by virtue of the policy, not by virtue of any "agreement" between himself and the insurer. Therefore, all such installments are paid "upon the death" or "by reason of the death" of the insured. COMMISSIONER OF INTERNAL REVENUE v. PIERCE, SUPRA; PIERCE v. COM'R, 2 T.C. 832.

(3) "Proceeds of life insurance policies" do *not* include payments of *interest only*, where the principal sum is retained by the insurer for a season undiminished. UNITED STATES v. HEILBRONER, 100 F. (2d) 379. Unlike installment or annuity payments, such interest payments are not regarded as being received "by reason of the death of the insured" (or "upon the death of the insured"). Thus, such interest payments are not regarded as "proceeds of insurance" of the kind which the statute exempts. They are, rather, earnings upon an investment.

(4) "Proceeds of life insurance policies" do *not* include payments of "dividends" or "excess interest dividends," even if added to an installment, if they are not payable, under the terms of the policy, certainly, definitely and absolutely as a part of the installments. If the policy makes their payment or their amount contingent upon future earnings, they are regarded as being paid, not "because of the death of the insured," (or "upon the death of the insured") but because of (or upon) an event which occurs after the death of the insured, to wit, the fact that the company has earned sufficient money to declare or pay such dividend. PIERCE v. COMMISSIONER, 2 T. C. 832; COMMISSIONER v. WINSLOW, 113 F. (2d) 418.

(5) "Proceeds of life insurance policies" do *not* include sums which are paid by the insurer in installments pursuant to an *agreement* between the insurer and the beneficiary, whereby the beneficiary, acting independently of the policy, leaves the proceeds with the company to be paid to him in the form of an annuity. In such case the arrangement is regarded as an

investment, and the payments are taxable as an annuity (i.e., 3% of the cost yearly until the untaxed sums received equal the cost, then 100% of the sums received).

I have outlined five situations which appear to me to cover most cases, and have expressed an opinion as to how each should be regarded under a proper interpretation of our statute. I do not present them as five rules covering every possibility. Cases may arise which demand further consideration. However, it is my opinion that, under a correct construction of our statute, you should apply the foregoing principles to the particular situations as indicated. According to my understanding, these principles are consistent with the Federal regulation as amended May 16, 1946.

LICENSE TAXES; AGRICULTURAL FAIRS; CIRCUSES; WHAT CONSTITUTES
AGRICULTURAL FAIR WITHIN MEANING OF SECTION 106;
SOUTHERN STATES FAIR

11 October 1946

You have requested my opinion as to whether the Clyde Beatty Circus is liable for the additional tax per performance of \$1,000.00 levied by subsection (e) of Section 106 of the Revenue Act, because it is operating in the City of Charlotte at the same time that the Southern States Fair is operating therein.

Subsection (e) of Section 106 of the Revenue Act levies a tax of \$1,000.00 per performance, in addition to the other taxes levied therein, on each circus, etc., which gives an exhibition or performance in any county, city or town, or within five miles thereof, wherein is held *an annual agricultural fair*. That the Clyde Beatty Circus is a circus within the meaning of subsection (e) we may take as datum. The question thus presented for decision is whether the Southern States Fair is an annual agricultural fair within the meaning of that subsection.

There is no definition of an agricultural fair in the Revenue Act and I have been unable to find any case in North Carolina which throws any light on this question. However, a case almost completely analogous is *STATE v. LONG* (Ohio, 1891), 28 N. E. 1038. In that case, the following appears:

"The bill of exceptions shows that evidence was offered by the state tending to show that sales of intoxicating liquors were made by the defendant within two miles of the place where the Salem fair and exposition was then being held, as charged in the indictment; and that the Salem Fair & Exposition Company was incorporated January 31, 1890, under the provisions of section 3235, Rev. St., with a capital stock of \$10,000, divided into shares of \$25 each, with its location and place of business at Salem, Columbiana County, Ohio. The certificate states that 'the purpose for which this corporation is formed is to provide, maintain, and manage grounds for the exhibition of farm and fancy stock, together with domestic animals of all kinds, agricultural, horticultural, mechanical, and industrial products of every description, including works of art; also for speeding horses, giving exhibitions of riding and driving, and such other displays as will conduce to the interest and entertainment of the community, for profit.' The ground upon which the court directed a verdict for the defendant is that the company, being organized for profit under the provisions of the section above referred to, is not an agricultural fair, within the

meaning of section 6946, under which the indictment was framed; that this section applies only to sales made within the distance named of such state, district, county, and township agricultural fairs as are provided for in the chapter on 'Agricultural Corporations,' Rev. St. p. 941. The language of the section (6946) on which the indictment is framed, is: 'Whoever sells intoxicating liquors . . . within two miles of the place where any agricultural fair is being held,' shall be punished as therein provided. It is true that the primary, and we may say the etymological, meaning of the word 'fair' simply embraces a market for the buying and selling of such articles as may be exhibited; but it is also true that it is now more generally used to designate an exposition where the industrial products of a people are exhibited as a display of the success, workmanship, and art of the exhibitors, and to obtain such premiums as may be paid by the owners of the fair as a reward of excellence; so that the Salem fair and exposition falls within the usual and ordinary acceptance of the word 'fair,' as used in the statute. The argument, however, of the defendant that such construction should not be placed on it, is based upon a review of the history of legislation upon the subject. The Salem Fair is a private corporation organized for profit under the provisions of section 3235, Rev. St., authorizing individuals to incorporate for any purpose for which they may lawfully associate themselves, except for dealing in real estate or carrying on professional business. The provisions of this section were first incorporated into our statutes by the Revision of 1880; so that prior to this time, as claimed, there were no private agricultural fairs organized for profit as the Salem Company now is; and the only fairs known to our statutes were such state, district, county, and township fairs as were provided for in the various statutes collected and codified in the chapter of the Revision above referred to. So that the offense of selling intoxicating liquors, made punishable by section 3 of the act of 1856, to protect fairs and fair grounds, (Swan & C. St. 68,) was of necessity, as well as by its language, confined to sales made 'within two miles of the place where any such agricultural fairs' was held; and therefore, that section 6946 of the Revision, being, as claimed, simply a codification of the provisions of the criminal law on the subject then in force, should not be extended to fairs organized as the Salem Company is. Here it should be observed, in the first place, that the act of 1856, (Swan & C. St. 67,) punishing sales of liquor within two miles of a fair ground, was made applicable to 'any independent agricultural society' as well as to state, county, and township organizations,—manifesting a purpose to extend its provisions to all such societies then existing, irrespective of the mode of their organizations; and no reason appears why such should not have been the policy of the state. Certainly the same inconvenience and annoyance will result to the individual and the public from the sale of liquor near a fair-ground, however the fair itself may be organized; for, whether organized upon one plan or another, it will be attended and patronized in the same community, by substantially the same persons; and we take it that the policy of the statute is founded on the duty of protection to the people who attend such fairs, rather than to the fair itself. Again, this section of the Revised Statutes has been amended a number of times since 1880,—the last amendment having been made in 1888; and at each time the language 'any agricultural fair' was inserted and continued in the amendment, although many fair companies organized as the Salem Company is organized are known to have existed throughout the state at the time of each amendment. But, independent of these considerations, the construction claimed is inadmissible. The language of the statute is free from any ambiguity, and therefore precludes any construction contrary to the plain import of its terms. 'Any agricultural fair,' must include all agricultural fairs or none, for there is nothing in the statute by which any distinction can be taken as between such fairs."

The reasoning of the court in this case is persuasive and, since it is the only case found construing the statute, I feel constrained to follow it.

The fact that amusements and recreational facilities are exhibited as a part of the Southern States Fair does not prevent it from being an agricultural fair. 2 AM. JUR., AGRICULTURE, Section 53.

With these provisions in mind, I am of the opinion that the Southern States Fair is an agricultural fair within the meaning of that term in Section 106 of the Revenue Act.

The statute is presumed to be constitutional and should be enforced until declared invalid by the courts. *BICKETT v. TAX COMMISSION*, 177 N.C. 433.

INHERITANCE TAXATION; COMPUTATION OF TAX ON LIFE INTEREST IN
RESIDUARY ESTATE HELD IN TRUST WHERE WILL PROVIDES THAT
ALL INHERITANCE TAXES SHALL BE PAID FROM
RESIDUARY ESTATE

15 October 1946

Under date of September 16, 1946, I advised that, in my opinion, where the will provides that all inheritance taxes shall be paid by the executor out of the general or residuary estate, the value of a specific legacy, for purpose of computing the inheritance tax on such legacy, is ascertained by adding to the specified amount of the legacy an amount sufficient to increase such legacy up to an amount which will yield to the legatee the specified amount after deduction of the tax computed on the increased amount. This can be done by treating the specified amount of the legacy as 100% less the rate of the tax. For instance, if the rate of tax is 8%, the specified amount of the legacy will be 92% of the total taxable value of the legacy; you may then find what constitutes 100% by simple arithmetic.

Under date of October 3, 1946, I advised you further that such a provision in the will did not have this effect, insofar as inheritance taxes upon the residuary estate itself are concerned; and that the taxable value of the interest of a life beneficiary in a trust estate was to be ascertained on the basis of the total value of the residuary estate, rather than the total value of the residuary estate less taxes thereon.

It appears that you have had some difficulty in the application of these principles.

Briefly, it is my opinion that a provision in the will that all inheritance taxes shall be paid out of the residuary estate, affects the value of the residuary estate only insofar as it requires the residuary estate to bear the tax burden of gifts *other than the residuary estate*; and that otherwise such a provision has no effect upon the taxable value of the residuary estate or of any share or interest therein.

I believe that some of the confusion may be eliminated if we regard the residuary estate, at least for purposes of ascertaining taxable value, as *one* gift, as a specific legacy is one gift. Thus, if the residuary estate is left absolutely and entirely to one person, you would have no difficulty in computing the tax. You would simply treat the residuary estate as you would a specific legacy; i.e., you would compute the tax upon its full value, without diminution by reason of any taxes on it, estimated or otherwise. The

executor would then deduct the tax as provided by Section 16 of the Revenue Act and pay what is left to the legatee. It is true that the legatee actually receives less than the full amount; but he pays a tax computed on the full amount.

But when the residuary estate is left to more than one person, confusion results, for we then begin to think of the residuary estate as being more than one gift and as giving rise to more than one inheritance tax. Although in a sense this may be true, it tends to confuse the matter of ascertaining the value of the residuary estate for inheritance tax purposes. Immediately we are confronted with the problem of placing a value upon the separate gifts which we regard as being made "out of" the residuary estate; and the question arises whether or not a provision in the will that all inheritance taxes shall be paid out of the residuary estate requires any adjustment between the values of the residuary gifts in the way that such a provision requires an adjustment of values as between the residuary estate and a specific legacy. We then are inclined to follow a line of reasoning which attributes to such a provision the effect of causing an increase in the value of one residuary beneficiary's interest and a corresponding decrease in the value of another residuary beneficiary's interest.

Thus, by adopting a false premise, we arrive at a false conclusion.

Therefore, it seems to me that some of the confusion may be eliminated if we regard the residuary estate, for purposes of valuation, as one gift, regardless of how many persons have interests therein, regardless of how varied those interests are, and regardless of the fact that the beneficiaries are in different rate classes. In my opinion, this is the correct premise.

If we treat the entire residuary estate as one gift, we know its unit or entire value immediately. That entire value does not change by reason of the fact that various beneficiaries of various rate classes have various interests therein. The only problem then is one of *apportioning the total value among the various beneficiaries* for the purpose of computing the tax. For instance, if a residuary estate, consisting of \$100,000 in cash is left equally to a Class A beneficiary and a Class B beneficiary, the value of the residuary estate is \$100,000, and this value is simply apportioned equally between the two beneficiaries, the value of each share being \$50,000.

In the example just given, a provision in the will that all inheritance taxes shall be paid out of the residuary estate does not change either the value of the entire residuary estate (\$100,000) or the value of either share (\$50,000).

Does such a provision in the will have *any* effect on the residuary estate, insofar as its taxes are concerned? That depends upon the language which the testator uses. Such a provision *can* have an effect under certain circumstances. For instance, a testator may by the use of appropriate testamentary language, equalize the tax burden as between several residuary beneficiaries subject to different tax rates by providing that the taxes on all the residuary shares be paid out of the residuary estate as a whole before division among the several residuary beneficiaries, so that the *actual* division among them will be of the net residuary estate after taxes. But in order to have this effect the language of the will must be unequivocal and free from doubt. RE ESTATE OF UBER (Pa. 1938) 199 Atl. 356, 116 A.L.R. 851; 28 Am., Jur., *Inheritance, Estate and Gift Taxes*, Section

281; *Annotation*, 116 A.L.R. 854; *Annotation*, 141 A.L.R. 847. The effect of such a provision is to distribute the tax burden of the residuary estate among the various residuary beneficiaries differently from what it would be if each beneficiary paid the tax on his share.

There is a question in each case whether or not the language of the will is adequate to have the effect of spreading the tax burden equally or proportionately among several beneficiaries of different rate classes, for such language must clearly require this result; otherwise each beneficiary must bear the burden of the tax computed upon his allocated share of the total value of the residuary estate. *RE ESTATE OF UBER, SUPRA*. In the case just cited, language similar to the provision under consideration was held not to be adequate to have this effect. However, language to the effect that all inheritance taxes "which may be levied against the bequests of beneficiaries in my said will are to be paid by my estate so that the several beneficiaries shall receive their respective bequests without any such deductions," has been held to be sufficient to show an intent that taxes should be paid out of the residuary estate before actual division among the residuary beneficiaries according to their respective interests. *RIPPEL v. KING* (1939) 126 N. J. Eq. 297, 8 Atl. (2d) 77. Our own court has implied that the testator may select that part of his estate which is to bear the tax burden. In *WACHOVIA BANK & TRUST COMPANY v. LAMBETH*, 213 N. C. 576, the court held that where a testator leaves his residuary estate in trust, with the income payable to named beneficiaries for life, then to their bodily heirs for life, and with the corpus to go ultimately to remaindermen free of trust, the inheritance tax upon the entire residuary estate is chargeable against the corpus of the estate, and "in the absence of any provision in the will, or of the trust agreement, requiring the reimbursing of the principal from income, no such reimbursement can be required of the executor or trustee, the theory being, in cases such as the one here under consideration, where the beneficiaries generally during the life of the trust receive the income in succession, that as between them the reduction of the principal will proportionately reduce the income to each beneficiary in succession, and that as to the remainderman it was the intention that his estate should come to him diminished by the amount of the inheritance tax." Courts in other jurisdictions reach a contrary result, saying that, where the corpus is used to pay taxes on the life beneficiary's interest, the trustee must reimburse the corpus out of the life beneficiary's income. 28 *Am. Jur., Inheritance, Estate and Gift Taxes*, Section 283.

Therefore, a provision in the will as to payment of taxes out of the residuary estate may have *some* effect, if the language is adequate. That effect is to spread the tax burden among various residuary beneficiaries of different rate classes by requiring payment of taxes out of the whole residuary estate prior to actual division.

However, this does not mean that the *taxable value* of the residuary shares is affected by such a provision. The taxable value of each share or interest in the residuary estate remains the same. It is well to bear in mind that there are two separate and distinct problems: (1) computing the tax, and (2) determining who shall pay it. For the purpose of computing the tax, it is necessary to take the total value of the residuary

estate and to apportion that value among the various interests in the residuary estate. It is on these apportioned values that the tax is computed. After the tax is computed, it must then be decided how it is to be paid. It is at this point that the will provision has its possible effect by providing that all taxes on the residuary estate shall be paid out of the whole rather than out of the individual interests. Such a provision merely places the tax burden upon the residuary estate in a certain way. It does not change the taxable value of the residuary estate or of the shares therein. It is for this reason that I express the opinion that, for the purpose of *computing* the inheritance tax upon the residuary estate itself, such a provision in the will may be disregarded.

The theory that the residuary estate is one gift with one total value, apportionable among the residuary beneficiaries, is equally applicable where the residuary estate is given for life with limitation over. Section 17 of the Revenue Act provides that if a legacy or devise is given to a beneficiary for life, or for a term of years, or on a contingency, with remainder to another, the tax is due on the whole amount or value of the legacy or devise, and that said tax shall be apportioned between the life tenant and the remainderman on the basis of the mortuary and annuity tables. Observe that the statute speaks of a single legacy or devise; of a single value; of a single tax; and of apportionment of that single tax between the life tenant and the remainderman. Under this statute the residuary estate has one total value as in the case of any other single legacy or devise; and that total value is apportioned between the two persons having an interest therein: the life tenant and the remainderman. See *STATE v. BRIDGERS*, 161 N. C. 247.

Therefore, I am of the opinion that, for the purpose of determining the value of the residuary estate and the values of the various shares or interests therein, the residuary estate should be regarded as a single gift, the whole value of which should be apportioned and allocated among the various persons having interests therein; and that this rule is not affected by a provision in the will that all taxes shall be *paid* out of the residuary estate. The only possible effect of such a provision would be to spread the tax burden among the residuary beneficiaries *after* the tax has been computed on the apportioned values of the several shares; and it is doubtful that it ordinarily would have even this effect.

The principles stated herein are not difficult to apply where the ultimate beneficiary of a trust estate is a charity. The problem here is simply one of taking the total value of the residuary estate as a single gift, and of apportioning that total value between the life beneficiary and the charitable remainderman. Of course, that part of the total value allocated to the charity would not be taxable. Thus, the only tax would be that which is computed upon that part of the total value allocated to the life beneficiary. This tax would then be *payable* out of the corpus, under the rule in the *WACHOVIA BANK* case, without any adjustment between the life beneficiary and the charity.

I believe that some confusion has resulted from an attempt to apply to the residuary estate the rule which I stated in my letter of September 16, 1946, with reference to a specific legacy; *i.e.*, that where the will provides that all inheritance taxes shall be paid out of the residuary estate, the

effect is to increase the value of the specific legacy, the correlative effect, of course, being to reduce the value of the residuary estate to exactly the same extent, for what one gains the other loses. The transaction amounts to nothing more than a transfer of money from one testamentary gift (the residuary estate) to another (the specific legacy).

To this extent such a provision in the will, it must be conceded, does change the value of what otherwise would be the residuary estate. But this is as far as it goes. Insofar as taxes on *the residuary estate itself* are concerned, such a provision has no effect whatever upon the taxable value of the residuary estate or of any share or interest in the residuary estate. The residuary estate is all that is left of the testator's property. The journey of the tax burden must necessarily stop there, for there is no other place for it to go. This is its last resting place. This being so, there is no other fund or property which can be called upon to increase the value of the residuary estate by paying its taxes in the way that the residuary estate is called upon to pay the taxes of the specific legacies. There is no other property on which the residuary estate can draw and thereby be enriched. Its value remains unchanged, regardless of such a provision, for it must bear its own tax burden.

However, it has been argued that such a provision means that the life beneficiary is to get his interest tax free and that taxes are to be paid out of the "remainder." Such an argument overlooks the fact that the residuary estate is a *single gift*, in which the life beneficiary and the remainderman have interests, and proceeds upon the false premise that the "remainder" is the "residuary estate" which must bear the tax burden. The "remainder" is not the "residuary estate"; it is merely an interest in the residuary estate, just as is the interest of the life beneficiary. The provision of the will places the tax burden upon the "residuary estate" or the "general estate." This includes the entire residuary estate, not merely the remainder interest therein. Where the residuary estate is left in trust with the income payable to a life beneficiary, and with the corpus thereafter to go to charity, the executor is to pay the tax out of the corpus of the residuary estate. The effect of this is two-fold: it lessens the life beneficiary's income by reducing the corpus; and, by the same token, it reduces the corpus ultimately to go to charity. The effect of such a provision, therefore, is not to give the life beneficiary his interest "tax-free," for the tax burden rests upon the very gift in which he has an interest. It is as if the residuary estate had been a specific legacy placed in trust under the same conditions, without any provision that taxes should be paid out of the residuary estate.

Even if such a provision were to be construed to place the tax burden upon the "remainder" in the residuary estate, the result would be the same, for under the rule of the WACHOVIA BANK case the entire tax is payable out of the corpus anyway, unless the will shows a contrary intent. But, as has been pointed out already, the effect of this is merely to place the burden of the tax, to state what property or fund shall *pay* it, after the tax has been computed. The effect is not to change the value of any interest in the residuary estate or to affect in any way the manner in which the tax is *computed*. The tax is *computed* upon the apportioned parts of the entire value; it is then *paid* as the testator may direct.

By way of brief summary:

A provision in the will that all inheritance taxes shall be paid out of the residuary estate does reduce the value of the residuary estate to the extent that it increases specific legacies. But when it comes to taxes on the residuary estate itself, such a provision does not have this effect. It neither increases nor decreases the value of the residuary estate or of any share or interest therein. The problem is simply one of apportioning the total value of the residuary estate among the various beneficiaries. The share of each beneficiary, as a general rule, stands for the taxes on such share. But it is possible for the testator, by the use of clear language, to distribute the tax burden among the residuary beneficiaries in any way he sees fit; and where the residuary estate is left in trust, with the income payable to life beneficiaries, and the corpus to go thereafter to remaindermen, it is said to be the intent that the entire tax on the residuary estate be chargeable against the corpus of the estate.

These principles may be simplified by an example:

The will leaves to John, a Class B beneficiary, a specific legacy of \$1,000. It then leaves the residuary estate in trust, the income to go to John for life, and the corpus to go thereafter to charity. The will provides that all inheritance taxes shall be paid out of the residuary estate. The entire estate, after payment of debts and expenses, consists of \$51,000 in cash.

Under these facts the taxable value of John's specific legacy is \$1,000 plus an amount which will net exactly \$1,000 to John after deducting taxes computed on the total amount. John's rate of tax is 4%, and the total value of the legacy, computed on an assumed rate of 4%, would be \$1,041.66. This amount is then subtracted from the entire net estate of \$51,000, leaving \$48,958.34, which is the value of the residuary estate. Assuming that the mortuary and annuity tables apportion to John's life interest 80% of the total value of the residuary estate, this fraction would be applied to \$48,958.34. The result, \$39,166.67, would be the value of John's life interest in the residuary estate. You would then add the value of John's specific legacy (\$1,041.66) to the value of his life interest in the residuary estate (\$39,166.67). The result, \$40,208.33, would be the total value of John's inheritance; and the tax would be computed in the various rate brackets on this amount. The entire amount of the tax so computed would then be paid by the executor out of the corpus. The effect of this would be to reduce the life beneficiary's income and to diminish the corpus ultimately payable to charity.

You will observe that in ascertaining the value of John's specific legacy (\$1,041.66) I have used an assumed tax rate of 4%, the rate applicable to the first bracket of the total value of John's interest under the will; and, inasmuch as the total value of John's interest (\$40,208.33) demands computation of the tax at graduated rates up to and including 7%, you may ask why I assume a 4% rate upon the specific legacy, in computing its total value, rather than 7% or some other rate. In other words, you may ask why I have assumed that the specific legacy is in the first tax bracket rather than the last. In my opinion, the assumption is justified on the theory that the law requires preference to be given to specific legacies over the residuary estate in the distribution of the estate. The specific

legacies must be satisfied first. Therefore, it seems reasonable to assume that they are the first moneys received and that they are entitled to the tax rates applicable to the first brackets. In this connection you will observe that the statute provides a rate of 4% for the "First \$5,000."

In the example given above the residuary estate is the sum of \$48,958.34 which remains after payment of debts, expenses and John's specific legacy. This is its value. That value does not change. True, after taxes are computed on the basis of that value, they are paid out of the corpus; and this, of course, reduces the residuary gift, just as taxes which are deducted from a specific legacy reduce its net value to the legatee. But the *value*, for purposes of computing the tax, is not thereby reduced. The taxable value of a testamentary gift is never reduced by taxes on that gift.

You have submitted to me certain facts and figures pertinent to the Pegram estate. Upon an attached sheet I have computed the inheritance tax consistently with the opinions herein expressed.

COMPUTATION OF TAX IN RE PEGRAM ESTATE

Ascertainment of Value

Net estate after payment of debts, etc.	\$244,310.59
Subtract: Total value of specific legacies other than the specific legacy of Francis, increased by enough money to pay the tax thereon (This is your own computation)	1,396.01
	<hr/>
	\$242,914.58
Subtract: Value of Francis' specific legacy (\$5,234.50) increased by enough money to yield the net amount after deducting 8% tax on the increased amount (Class C beneficiary, first bracket)	5,689.67
	<hr/>
Net value of residuary estate	\$237,224.91
Value of life interest in this amount (@ 87.73%)	208,117.41
Add: Value of Francis' specific legacy	5,689.67
	<hr/>
Total value of Francis' interest under will	\$213,807.08

Computation of Tax

8% on first	\$ 10,000.00	\$ 800.00
9% on next	15,000.00	1,350.00
10% on next	25,000.00	2,500.00
11% on next	50,000.00	5,500.00
12% on next	113,807.08	13,656.84
	<hr/>	<hr/>
	\$213,807.08	\$23,806.84

Note: I have not computed the tax on Francis' specific legacy twice, as it may appear at first sight. I have only *used* the 8% tax rate the first time in order to ascertain the *value of the specific legacy*. Tax is not actually computed and deducted until the value of the specific legacy becomes a part of Francis' total interest under the will.

INHERITANCE TAXES; INSURANCE; CHANGE OF BENEFICIARY; ABSENCE OF
ENDORSEMENT OF POLICY WHEN POLICY REQUIRES ENDORSEMENT TO
CHANGE BENEFICIARY; ESTATE OF W. LOEBER LANDEAU

22 October 1946

You have requested me to advise you whether the children of W. Loeber Landeau, hereafter called the insured, or his wife is the beneficiary in a \$10,000 policy of insurance issued on the life of the insured. The facts upon which you request my opinion are as follows: The policy of insurance in question, together with other policies, was purchased by the insured prior to 1933. In 1933 the insured executed an amendment to the policy revoking the right to change and successively change any beneficiary named in the insurance policy insofar as his wife was concerned, but reserving the right to make a change in beneficiaries insofar as beneficiaries other than his wife were concerned. On May 10, 1943, the insured and his wife executed an amendment to the insurance contract naming the executor or administrator of the insured as beneficiary. On May 12, 1943, the wife of the insured was again named as beneficiary if she should survive the insured; otherwise the proceeds were to be paid to the son of the insured. The insurance company was notified of each of the above-mentioned amendments, and proper endorsements were made on the insurance policy.

About March 16, 1944, the insured and his wife executed an amendment to the policy naming the two children of the insured as the beneficiaries therein. The policy was never sent to the insurance company for endorsement. The policy provided that any change in beneficiary shall become operative only when endorsed upon the policy in the home office of the company. The insured died on November 4, 1945.

Despite the fact that the change of beneficiaries was not endorsed on the policy, as required therein, it is my opinion that the beneficiaries were legally changed, and the children are entitled to the proceeds of the policy. *TEAGUE v. INSURANCE COMPANY*, 200 N. C. 450; *FERTILIZER COMPANY v. GODLEY*, 204 N. C. 243. In *TEAGUE v. INSURANCE COMPANY*, *SUPRA*, the following appears, quoting from *WOOTEN v. ORDER OF ODD FELLOWS*, 176 N. C. 52:

"It is now considered that an insurance company may make reasonable rules and regulations by which the insured may change the beneficiary named in the policy of insurance, or his certificate in case of benefit societies, and that such rules and regulations become a part of the contract. Where the policy or rule of the company, or society, provides that such change may be made in a particular way, the method prescribed should be followed, but if the insured has done substantially what is required of him, or what he is able to do, to effect a change of beneficiary, and all that remains to be done are ministerial acts of the association, the change will take effect, though the formal details are not completed before the death of the insured. It must be understood, however, that some affirmative act on the part of the insured to change the beneficiary is required, as his mere unexecuted intention will not suffice to work such a change. When the right to substitute another beneficiary exists by express reservation, or otherwise, the insured or member of a benefit society, may, without the consent of the original beneficiary, and subject only to the rules of the association, change his beneficiary at will. *POLLOCK v. HOUSE-*

HOLD OF RUTH, 150 N. C. 211, 63 S. E., 940. This is true, because the beneficiary whose right, under the policy or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured. The revocation of his appointment as beneficiary does not require his consent, as the power to displace him is vested solely in the insured, provided he proceeds in substantial compliance with the rules of the association, which may be waived by the company or society, where they are made for its benefit or protection."

It is true that there is a split of authority on this point, but the great weight of authority is in accord with the provision quoted above. 29 *Am. Jur., Insurance*, Section 1320; 46 C.J.S., *Insurance*, Section 1175.

I, therefore, advise that the attempted and intended change of beneficiaries was legally effected.

SALES AND USE TAXES; COST-PLUS-A-FIXED-FEE CONTRACT WITH
FEDERAL GOVERNMENT; THE KELLEX CORPORATION

28 October 1946

You have referred to me the contract entered into by the Federal Government (Navy Department) and the Kellex Corporation, hereinafter called taxpayer, and requested that I advise you whether sales to taxpayer are subject to the North Carolina sales and use taxes.

The contract provides that the taxpayer shall supply the necessary facilities, materials, etc., for the performance of the tasks specified therein. It also provides in Article 4 that, "The title to all materials, parts, assemblies, subassemblies, supplies, equipment and other property for the cost of which the Contractor is entitled to be reimbursed hereunder shall automatically pass to and vest in the Government upon delivery to the Contractor or upon the happening of any other event by which title passes from the vendor or supplier thereof. . . ."

I find nothing in the contract which discloses that taxpayer has the authority to bind the Federal Government by its contracts for the purchase of materials. On the contrary, the contract implies that the taxpayer is to make purchases in his own name and on his own credit. There is nothing in the contract which provides that the title to materials purchased shall not pass through the taxpayer to the Federal Government.

Since the abovementioned provisions do not appear in the contract, I am of the opinion that sales to the taxpayer in North Carolina are subject to the North Carolina sales tax, and the use of materials by the taxpayer in this state renders him liable for the North Carolina use tax. *ALABAMA v. KING & BOOZER*, 314 U. S. 1, 86 L. ed. 3; *CURRY v. U. S.*, 314 U. S. 14, 86 L. ed. 9.

INCOME TAXATION; TAXABLE GAIN FROM FORCED SALE; LITIGATION
EXPENSES OF GUARDIAN NOT ORDINARILY DEDUCTIBLE

28 October 1946

You have referred to me a letter from George C. Hampton, Jr., Esq., attorney at law, Greensboro, N. C., dated October 15, 1946. Mr. Hampton has not been able to agree with the conclusions reached by me in my opinion to you under date of September 27, 1946.

Mr. Hampton points out that I have cited only federal authorities for my conclusion that a gain may result from an involuntary or forced sale. He states further that "there is a vast difference between the federal and state statutes involved," and that "the federal statute specifically states that taxable gains resulting from involuntary sales shall be taxable."

I am not advertent to any provision in the federal statute which expressly states that gains from involuntary sales are taxable. I do agree that "there is a vast difference between the federal and state statutes"; but this difference relates not to whether or not any gain or loss at all results from an involuntary sale, but whether or not the gain or loss is a *capital* gain or loss which occurred under certain circumstances which warrant a particular kind of treatment for federal income tax purposes. The federal cases cited in my letter dealt, in fact, not with the question whether or not a gain or loss resulted (that was taken for granted), but with the question whether or not it was a *capital* gain or loss resulting from a "sale or exchange." Under our statute that question would not arise in this case, for capital gains are taxable at 100% as in the case of any other taxable income.

Indeed, it seems unnecessary to cite authority for the proposition that a taxable gain was realized in this case. Certainly a gain resulted from the sale, even if involuntary. Our definition of "gross income" is clearly adequate to embrace such a gain. There is nothing in the Revenue Act which exempts such gains just because they are involuntary. Moreover, Section 319 speaks of "ascertaining the gain or loss from the sale or other disposition of property."

In my opinion a taxable gain clearly may result from an involuntary or forced sale.

Mr. Hampton also expresses doubt as to the correctness of my conclusion that the guardian's litigation expenses are not deductible. In order that he may understand the reason for my conclusion, I am enclosing a copy of my opinion of August 28, 1946, in which a similar question was discussed. Briefly, it was my opinion, in Mr. Hampton's case, (1) that a guardianship estate is not a "trade or business" whose expenses would be deductible *per se*, but that the estate (as taxpayer) stood in the position of any other individual person similarly situated, and (2) that the litigation expenses were not expenses paid in carrying on a trade or business.

Mr. Hampton now states, however, that these litigation expenses "were all part of the expense incident to the final confirmation of the sale, and a substantial part was directly involved in the payment of those fees, costs and expenses necessary to a confirmation of the involuntary sale, and without the payment of which a valid involuntary sale would not now exist."

I am inclined to agree that "expenses of sale" would be deductible from the sale price so as to arrive at net proceeds of sale in the determination of gain or loss. However, I have not been convinced that the fees and costs in question are properly "expenses of sale." It seems to me, rather, that they were expenses incurred in contesting claims against property in the fiduciary's hands, and that they were not necessary at all to the actual sale. I am unable to see any legal basis for permitting such expenses to diminish the gain which resulted from the sale. The fact that such ex-

penses may have been incurred prior to confirmation of the sale does not, in my opinion, affect the question. It appears to me that the situation is the same as if the expenses were incurred in contesting claims to the property several years prior to these sale proceedings, or as if the expenses were incurred in contesting claims to the proceeds of sale several years after the sale was confirmed.

Needless to say, I shall be happy to consider any further facts which Mr. Hampton may wish to present. It is not my desire to assume a dogmatic position upon the question, and I shall be glad to discuss the matter with him personally if he so desires.

SALES TAXATION; SALES TO HOUSING AUTHORITY EXEMPT

29 October 1946

You have requested me to advise you as to the taxability of sales of coal to the apartments at Skyway Terrace on the old Laurinburg-Maxton Army Air Base. It appears that these apartments are owned by the United States Housing Authority and are operated by the Housing Authority of the City of Fayetteville.

The United States Housing Authority was created by an act of Congress under the Department of Interior, and is an agency and instrumentality of the United States. USCA, Title 42, Section 1403. The United States Housing Authority is exempt from all taxation by the United States or by any State, county, municipality or local taxing authority. USCA, Title 42, Section 1405 (e). Said Authority has the power to lease any "Federal low-rent housing project" to a "public housing agency." USCA, Title 42, Section 1412 (d). The opinion herein expressed proceeds upon the assumption that the United States Housing Authority has leased a "Federal low-rent housing project" to the Fayetteville Housing Authority as a "public housing agency."

In my opinion it is not material whether the sales to which you refer are made to the United States Housing Authority or to the Fayetteville Housing Authority. If the sales are made to the United States Housing Authority, they would be exempt from taxation by an act of Congress. USCA, Title 42, Section 1405(e). If the sales are made to the Fayetteville Housing Authority, they would be exempt from the sales tax by Section 406 (d) of the Revenue Act which provides an exemption of sales made to the State of North Carolina or any of its sub-divisions. Our court has held that a housing authority created under the laws of this State is a municipal corporation, and, therefore, a sub-division of the State. *WELLS v. AUTHORITY*, 213 N. C. 744.

INCOME TAXATION; TAXABILITY OF WOMAN'S CLUB OF DUNN, N. C.

30 October 1946

You have requested me to advise you as to the taxability of a capital gain realized by the Woman's Club of Dunn, N. C., through the sale of a certain parcel of real estate owned by said club. On the basis of my under-

standing of the character of this club, it would seem to me that such club would be embraced within the following exemption in Section 314 of the Revenue Act:

"Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member."

Therefore, I am of the opinion that the Woman's Club of Dunn, N. C., is not taxable on income derived by it from the sale of its club house in Dunn, N. C.

INHERITANCE TAXATION; TAXABILITY OF POWER OF APPOINTMENT;
JESSIE ELLA PARKINSON ESTATE

31 October 1946

You have handed me copies of various legal documents and have requested me to examine the same and advise you of my opinion as to what is taxable for inheritance thereunder in this State. I have examined these documents, and it appears to me that the pertinent facts to be derived therefrom are as follows:

Under date of February 4, 1931, William Henry Parkinson, a resident of Brooklyn, N. Y., created a \$16,000 trust for the benefit of his son, George Edwin Parkinson, and provided that on the son's death the trustee should pay the principal of the trust to the trustor's wife, Jessie Ella Parkinson, "or if she be not then living, to such person or persons, in such shares and proportions as she shall by her last will and testament appoint."

By the same trust instrument the trustor, after providing for certain gifts in specific amounts to charities, and after setting up the \$16,000 for his son, as described in the preceding paragraph, directed that as to the residue of the estate at the trustor's death the trustee should pay all income (and all principal if she should request it) to the trustor's wife, Jessie Ella Parkinson, and, at her death "to transfer and pay over the principal of the trust to such person or persons, in such shares and proportions as she shall by her last will and testament appoint; or in default of valid exercise by her of the power of appointment by will as aforesaid to those persons who would have been the distributees of Jessie Ella Parkinson had she died intestate possessed of the trust estate and resident of the State of New York."

On July 24, 1933, William Henry Parkinson died leaving a last will and testament dated February 6, 1933, by which he gave \$1,000 to his son, George, and all the residue of his estate to his wife, Jessie.

Under date of October 3, 1933, the son, George, and his wife, Jessie, entered into an agreement whereby Jessie should cause the executors to pay to George the \$1,000 and an additional \$6,500; and whereby the \$16,000 trust theretofore created for George by his father should be augmented by \$14,000, making a total trust of \$30,000. Under date of October 10, 1933, this agreement was effectuated by the execution of a trust instrument.

At some time in 1946 Jessie Ella Parkinson died leaving a last will and testament dated February 18, 1946, whereby she directed that all debts be paid and then left all the rest of her property under the following provisions:

"Second. All the rest, residue and remainder of my property, real, personal or mixed, wheresoever and whatsoever the same may be, including any and all property, real, personal or mixed, over which, under the provisions of any will or deed of trust, I have a power of appointment, and including all the moneys or property which I may now own or may hereafter own or which may hereafter revert to me, under the terms of a trust instrument executed to the Brooklyn Trust Company, of Brooklyn, New York, and known as the George Edwin Parkinson Trust, I give, devise and bequeath to my niece, Emma Arline Pearse; to be hers to use and expend during her life time, but should there be any of said property remaining after her death, then I give, devise and bequeath the same in equal shares to her children then living and the children of any child that may be dead, the children of any child that may be dead to take in equal shares such share as the parent would take if living."

It is my opinion that there is a taxable transfer under these circumstances. Jessie Ella Parkinson died a resident of this State. At the time of her death she not only had certain property of her own to leave, but she also had the power of appointment conferred upon her by the trust instrument executed by her husband under date of February 4, 1931. In addition to the power of appointment as to the residuary trust, she had either a vested remainder in, or a power of appointment as to, the \$30,000 trust (originally \$16,000) created for the primary benefit of the son. If her interest in the \$30,000 trust was a vested remainder, the power of appointment granted with respect thereto would be unnecessary and therefore, mere surplusage. But, for purpose of computing the inheritance tax, it seems unnecessary to decide whether her interest in this trust was a vested remainder or a power of appointment, for what she transferred would be the same thing in either case.

Therefore, I am of the opinion that at her death the testatrix, Jessie Ella Parkinson, had:

- (1) That property which was hers absolutely.
- (2) A power of testamentary appointment with respect to the residuary trust estate created by the trust instrument executed by her husband on February 4, 1931.
- (3) A vested remainder in (or a testamentary power of appointment with respect to) the augmented \$30,000 trust estate created by the trust instrument executed by her husband on February 4, 1931, for the primary benefit of his son.

I assume that you wish me to advise you of my opinion as to the taxability of the exercise of the power of appointment. You have directed my attention to the fact that this office on March 2, 1936, issued a ruling to the effect that the death transfer of intangible property through the exercise in this State of a testamentary power of appointment granted by a testator in another State, with respect to intangible property held by a

trustee in the other State, could not be constitutionally taxed in this State because the intangibles had no taxable situs in this State. That ruling was based upon *WACHOVIA BANK & TRUST CO. v. DOUGHTON*, 272 U. S. 567, 71 L. ed. 413.

The *WACHOVIA BANK* case has been expressly overruled. The Supreme Court of the United States has now decided that a general testamentary power of appointment is, for inheritance tax purposes, the equivalent of ownership, and that either the exercise or non-exercise of such power is an appropriate subject of taxation at the domicile of the person who has such power, regardless of the fact that the property with respect to which the power exists is intangible property which is held by a trustee in another State which also has the right to tax. The court holds that the mere domicile of the person who has the power affords adequate constitutional basis for taxation of the intangibles, regardless of the fact that location of the paper evidence of such intangibles is elsewhere. *GRAVES v. SCHMIDLAPP*, 315 U. S. 657, 86 L. ed. 1097. Accordingly, our Revenue Act expressly taxes the exercise and the non-exercise of powers of appointment. Section 1, paragraph *Fifth*.

For the reason set out above, I conclude that the transfer of all property and interests in property effected by the will of Jessie Ella Parkinson is subject to our inheritance tax. For purposes of the valuation of the vested remainder it is not material whether the transfer was effected by direct testamentary disposition of her own vested remainder in the \$30,000 trust or by the exercise of a power of appointment. The same value is transferred in either event, *i.e.*, a remainder in the \$30,000 trust after the death of the son. The same is true of the exercise of the power of appointment with respect to any other property: the power is equivalent, for inheritance tax purposes, to ownership, and the result is the same as if the testatrix had owned the property, or interest therein, which she transferred by her will.

This seems to dispose of all questions except that which relates to how the tax shall be computed and by whom paid. This question arises because of the unusual language of the will of Jessie Ella Parkinson. While there is firm ground for argument that the provision quoted earlier herein created a life estate in the testatrix's niece, Emma Arline Pearse, coupled with a power of disposition, and with a contingent remainder to her children (contingent upon the life tenant's not exhausting the entire estate), nevertheless, I am inclined toward the view that a proper and reasonable interpretation of the will is that the testatrix intended to give her niece an absolute and complete estate in her property (all of which, it appears, is personalty); and it would follow that the limitation over to the children would be void. See *PEYTON v. SMITH*, 213 N. C. 155; *HEEFNER v. THORNTON*, 216 N. C. 702; *BURGESS v. SIMPSON*, 224 N. C. 102. But *cf.* *BRYAN v. HARPER*, 177 N. C. 308; *ERNUL v. ERNUL*, 191 N. C. 347; *BURWELL v. BANK*, 186 N. C. 117; *SMITH v. MEARS*, 218 N. C. 193; *BURCHAM v. BURCHAM*, 219 N. C. 357.

However, it is not necessary, for purposes of our inheritance tax, to decide whether or not the will creates an absolute estate in the niece or a life estate in the niece with contingent remainder to the niece's children, for,

in my opinion, the tax would be the same in either event. Section 17 of the Revenue Act (G. S. 105-19) provides:

"When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith *out of the property transferred*, and the Commissioner of Revenue shall assess the tax on such property." (Italics ours).

Here, even if the will creates a contingent remainder in the niece's children, which is doubtful, the niece may defeat it completely by completely consuming the property during her life. Therefore, the property should be taxed at the rate applicable to the niece, a Class B beneficiary (Section 4). However, her children and the descendants of her children are also Class B beneficiaries; so the rate of tax would be the same in either event.

It is not necessary to make any adjustment of the burden of the tax as between the life tenant and the contingent remaindermen (if the will creates such estates, which is doubtful). The tax would simply be paid out of the corpus of the property without any such adjustment, as if it were all bequeathed to the niece absolutely. WACHOVIA BANK & TRUST CO., 213 N. C. 576.

In summary, it is my opinion that the Class B rates of tax should be applied to the full aggregate value of (1) all property which the testatrix owned absolutely and completely at her death (2) the property which still remained at her death in the residuary estate created by the instrument of February 4, 1931, as to which she had and exercised a power of appointment, and (3) the vested remainder (after the son's death) in the \$30,000 trust created (originally at \$16,000) by the instrument of February 4, 1931.

INCOME TAXATION; DEDUCTABILITY OF CONTRIBUTIONS TO FOUNDATION FOR RECREATION OF CORPORATE EMPLOYEES

1 November 1946

You have referred to me a letter from Mr. W. F. O'Connell of A. M. Pullen & Company, Accountants, who represent Virginia Mills, Inc., Swepsonville, N. C., hereinafter called the taxpayer. Mr. O'Connell's letter is in further support of the contentions incorporated in his previous letter to which my opinion of July 9, 1946, was addressed.

The taxpayer contends that you should allow as ordinary and necessary business expenses contributions made by it to "The Baker Foundation," created under a trust indenture dated November 30, 1943, and executed by the President of the taxpayer. It appears that the Baker Foundation is controlled entirely by its trustees and not by the taxpayer; that the trust indenture under which it was created is irrevocable; that neither its principal nor its income can ever revert to the taxpayer; that its purposes are to make the taxpayer's employees more comfortable by providing for them recreational facilities and by generally doing such things

as will make them more contented, and, therefore, better workers; that toward this end playgrounds and a swimming lake have been acquired for the use of the employees, a recreational director has been employed to assist employees in obtaining the greatest benefit from the facilities provided, a building for indoor games and other recreation has been provided, and the operation of a moving picture theater has been commenced. It is contemplated that the activities of the Foundation may, in time, include direct assistance to less fortunate employees and their families.

The taxpayer contends that if the taxpayer were to provide such recreational facilities directly, the expenses incurred in so doing would be deductible as ordinary and necessary business expenses; and that the same deduction should be allowed where such facilities are provided for indirectly through a foundation, resulting in greater service and benefit to the employee.

After careful consideration of the matter I have been unable to arrive at the conclusion that such expenses are deductible even if paid directly for such recreational facilities. While a program such as this is indeed laudable, I am unable to find that the expense of carrying it out is so directly connected with the business of making a profit as to be "ordinary and necessary." It may be that recreational facilities do have some indirect effect upon the taxpayer's business by making the family of employees a happier one and, consequently, a more efficient and productive one. But an indirect effect, in my opinion, is not enough. It seems to me that any expenditure, in order to qualify as an ordinary and necessary business expense, must bear a *direct* relationship to the trade or business and must be reasonably calculated to have a direct effect upon production of income or the acquisition or maintenance of business. I am of the opinion that the relationship in this case is too indirect and too remote. Perhaps this sort of thing one day will be recognized as being "ordinary and necessary." It may be that it should be so recognized. But I am unable at this time to find satisfactory precedent for allowing it.

It may not be amiss to recall at this point that contributions to pension trusts have not always been allowed under Federal income tax laws; and that in this State they are still disallowed as an "ordinary and necessary expense."

It is true, as the taxpayer has suggested, that the Federal authorities have allowed support of a baseball team as a business expense; but only upon the ground that the team was used to advertise the taxpayer's business. JULIA DAHL ET AL, 24 B.T.A. 1167. Advertising has long been recognized as a legitimate expense of business.

Needless to say, I shall be glad to receive and consider any authorities contrary to the position I have taken.

INCOME AND FRANCHISE TAXATION; EXEMPT ORGANIZATIONS;
BROYHILL EDUCATIONAL FUND, INC.

4 November 1946

The Broyhill Educational Fund, Inc., has submitted to me a copy of its certificate of incorporation and by-laws, and has requested me to determine therefrom, and to advise you, whether or not in my opinion such corpora-

tion will be exempt from income and franchise taxation, and whether or not contributions made to such corporation will be deductible from gross income by individuals and corporations making the same.

The certificate of incorporation states that the objects for which the corporation is to be formed are to operate exclusively for religious, charitable, scientific, literary and educational purposes; and to solicit and receive money or property, and to use the income therefrom for any one or all of the following purposes: (1) Making gifts or loans to needy youths to enable them to obtain an education (giving preference to prospective ministerial students, children of employees of the Broyhill business enterprises, and communicants of the first Baptist Church of Lenoir, N. C.) (2) Making gifts or loans to other charitable, scientific, literary, religious and educational purposes. The certificate of incorporation expressly states further that the corporation is not organized for pecuniary profit and shall have no power to make or declare dividends. Said certificate states further that no part of the net earnings shall inure to any private person or member, and that the corporation shall have no capital stock. I deem the other provisions of the certificate of incorporation and the by-laws not to be pertinent to the question under consideration.

In my opinion the aforesaid certificate of incorporation and by-laws indicate that the Broyhill Educational Fund, Inc., is a non-profit educational or charitable organization within the meaning of Sections 314, paragraph 3, and 322, paragraph 9, of the Revenue Act. Accordingly, I am of the opinion that if said corporation operates as indicated by the certificate of incorporation and by-laws, it will be exempt from income taxation, and contributions to said corporation will be deductible to the extent provided in Section 322, paragraph 9.

I am further of the opinion that said corporation will be exempt from franchise tax under Section 213 of the Revenue Act if operated as indicated in the certificate of incorporation and by-laws.

INCOME TAXATION; CONSTITUTIONALITY OF STATUTORY ALLOCATION FORMULA; BUSH BUILDING COMPANY

13 November 1946

I have your letter of November 2, 1946, enclosing a letter of Bush Building Company, taxpayer. The taxpayer asserts that our statutory allocation formula is unconstitutional because it allocates to North Carolina too large a percentage of its income. The taxpayer attempts to make its point by showing that actual earnings in this state were much less than earnings allocable under the statutory formula.

I do not believe that sufficient facts have been developed at this time to enable me to decide the question of constitutionality of our statutory formula as applied to this particular case. However, it does seem to me that the burden of showing unconstitutionality rests upon the taxpayer, and that he has not carried this burden in his letter. The mere fact that our statutory formula gives us more income than would be attributable to this

state by using a separate accounting method is no test of constitutionality where the business is unitary. *BUTLER BROS. v. MCCOLGAN*, 315 U. S. 501, 86 L. ed. 991.

Of course, I shall be glad to consider any further facts which the taxpayer may care to present.

SALES AND USE TAXES; PROPERTY PURCHASED OUTSIDE NORTH CAROLINA
FOR EXPORT WHICH IS BROUGHT INTO THIS STATE FOR PACKING

19 November 1946

You have requested me to advise you as to the liability of Burlington Mills, Inc., for use taxes on property brought into this state by it under the following conditions.

Burlington Mills, Inc., purchases tangible personal property outside the State of North Carolina which is to be used by it outside the Continental United States. This property is sent to North Carolina, where it is packed and immediately sent on to the place at which it is to be used. None of the property is to be used or consumed in North Carolina. The property is not to be stored here except for a brief space of time in which it is being prepared for the continuation of its journey abroad.

Section 802 of the Revenue Act levies a tax on the storage, use or consumption in this state of tangible personal property purchased from a retailer for storage, use or consumption in this state. Since the tangible personal property brought into this state by Burlington Mills, Inc., under the facts outlined above was not purchased "for storage, use or consumption in this state," I am of the opinion that no tax liability is incurred by Burlington Mills, Inc. It is true that the property is temporarily stored here, but such a temporary storage does not, in my opinion, constitute storage in this state within the meaning of the compensating use tax act.

INHERITANCE TAXES; INSURANCE; RESIDENT INSURED;
NON-RESIDENT BENEFICIARY

20 November 1946

You have requested my opinion as to whether or not a tax is due the State of North Carolina under Section 11 of the Revenue Act in the following case. W. Loeber Landau, a resident of North Carolina, purchased certain policies of insurance on his own life, naming his wife as beneficiary therein, and reserving the right to change the beneficiary. Subsequently, the insured executed an amendment to the policies of insurance, relinquishing the right to change and successively change any beneficiary named in the policies insofar as his wife was concerned. The policies of insurance were procured by the insured, and the premiums thereon were paid by him until shortly prior to his death when the beneficiary began to make the payments. Decedent died November 4, 1945, still a resident of this state, but at the time of his death his wife was a resident of the State of Louisiana. You and the administrator of the estate of the decedent have agreed as to the credit which shall be allowed the beneficiary on account of premiums paid by her.

Section 11 of the Revenue Act reads in part as follows:

"The proceeds of life insurance policies, payable at or after the death of the decedent, shall, in the following instances, be taxable at the rates provided in this article, subject to the exemptions in Section 2 thereof:

" . . .

"2. When such insurance proceeds are receivable by all other beneficiaries as insurance under policies upon the life of the decedent—

(a) Where such insurance was purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance. *In all such cases, it is declared that life insurance and the transfer of the proceeds thereof is testamentary in nature, and, therefore, the payment of the premiums or other consideration by the decedent shall be deemed to effect a transfer from him at his death of benefits equal to such insurance proceeds, or such rateable proportion thereof regardless of* (1) whether the decedent had taken or retained any incidents of ownership in said policies . . ." (Italics added).

From the above-quoted provision of the statute it can be seen that the transfer of the decedent's interest in the insurance policies gave rise to a tax liability in the State of North Carolina. The amount of this liability is determined by the application of the inheritance tax rates and exemptions to the amounts of the policies of insurance. It is this transfer which is taxable, and it is immaterial whether the recipient of the thing transferred is a resident or a non-resident of the State of North Carolina. If the recipient of the thing transferred were a resident of this state, the transfer by the insured would give rise to the tax liability. This same transfer gives rise to the tax liability when the recipient of the thing transferred is a non-resident of this state. In other words, as Section 11 is worded, it is the transfer from the decedent which takes place at or prior to his death which gives rise to the tax liability.

In an annotation in 150 A. L. R. at page 1290 the following appears:

"Statutes have been enacted in a number of states expressly providing that the proceeds of life insurance, although payable to a specific beneficiary, shall be subject, on the death of the insured, to the state successions, transfer, inheritance, or estate tax, although, it should be observed, they commonly provide for the exemptions of such proceeds up to a certain amount.

"The power of a state legislature to enact such a statute has been upheld in *Allis's Will* (1921) 174 Wis. 527, 184 NW 381."

A more detailed annotation to the same effect appears in 80 L. ed. at page 181. See also 28 *Am. Jur., Inheritance, Estate and Gift Taxes*, Sections 69 and 70.

I, therefore, advise that, in my opinion, a tax is due the State of North Carolina in the case under consideration by reason of the provisions of Section 11 of the Revenue Act.

INHERITANCE TAXATION; COMPUTATION OF TAX ON PROPERTY TRANSFERRED
BY THE WILL OF JESSIE ELLA PARKINSON

21 November 1946

You have referred to me a letter from Mr. Paul Dana, who requests further advice upon the proper manner of computing and paying inheritance tax on property transferred by the will of Jessie Ella Parkinson, in connection with whose estate I expressed an opinion under date of October 31, 1946.

I believe that Mr. Dana's questions may be answered as follows:

I

Jessie Ella Parkinson at her death had either a power of appointment or a vested interest (it is not material which she had) in the \$30,000 trust established for the benefit of George Edwin Parkinson for life, with remainder to her or to her next of kin, or testamentary donees, or appointees. For purpose of simplicity, we shall say that she had a vested remainder in this trust property. This vested remainder is what she transferred by her will. It is, therefore, the thing that is taxable. Its value is determined by taking the full value of the trust property at her death (approximately \$42,000, according to Mr. Dana), and dividing that full value between the life tenant and the remainderman. This is done by finding the value of the life interest on the basis of the mortality tables, and then subtracting the value of the life interest from the whole value. The result is the value of the remainder which the testatrix disposed of by her will.

II

The inheritance tax is a tax upon the person who inherits, not a tax on the estate, or a tax on property. Thus, North Carolina cannot look to the trustee of the \$30,000 trust in New York for payment of the tax against one who inherits a vested remainder therein. North Carolina does look to the executor who holds other property in this state for the same beneficiary under the same will. The inheritance tax is payable by the executor, not necessarily out of specific property with respect to which the tax is levied, but out of any person's *share* in the estate, with respect to which share the tax is levied. Section 16, Revenue Act.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME; FEDERAL
DETERMINATION OF 1943 TAX LIABILITY BASED ON CORRECTED
1942 INCOME UNDER FEDERAL CURRENT TAX PAYMENT
ACT OF 1943

21 November 1946

You have referred to me a letter addressed to you by Messrs. Hudgins & Adams, Attorneys for M. B. Smith, Mrs. Elvira L. Smith, Mary Alyse Smith, J. Harold Smith, M. B. Smith, Jr., deceased, and Gertrude S. Smith, now Gertrude Smith Rosevear, hereinafter referred to as the taxpayers; and you have requested me to advise you of my opinion with respect to the matters therein set forth. Said letter constitutes a further presentation of the matters discussed in your office recently by Mr. Adams of the above-named firm, and by Mr. Charles Strandberg of A. M. Pullen and Company, Certified Public Accountants.

The facts appear to be as follows:

The taxpayers were stockholders of a corporation known as Liberty Hosiery Mills, Inc., which had completed its liquidation and had dissolved as of November 30, 1942. During 1942 the taxpayers had received two liquidating dividends from the surplus of this corporation, one as of March 31 and the other as of November 30. In their individual Federal income tax returns for 1942, taxpayers reported the receipt of these liquidating dividends and paid tax on the gain arrived at by treating the transaction as the equivalent of a sale of their respective stock holdings in accordance with the Federal income tax law. The taxpayers were of the opinion that, under the provisions of the North Carolina Revenue Act, no tax was due to the State on account of the receipt by them of said liquidating dividends. However, the corporation's return to the State for the fiscal period ending November 30, 1942, and the taxpayers' return to the State for the taxable year 1942, disclosed that "non-taxable dividends" were paid by the corporation and received by the taxpayers. These returns did not indicate that the "non-taxable dividends" were "liquidating dividends." All of said returns were filed within the time required by law.

In 1944 (as the result of an audit made in 1943) the Federal Government disallowed certain deductions that had been claimed on the return of the corporation for the fiscal period ending November 30, 1942, thereby increasing the amount of taxable income of the corporation and assessing certain deficiencies in tax. The taxpayers never actually received any additional liquidating dividend based on these adjustments, since in the meantime the physical properties of the corporation had been acquired by a partnership of which they were partners. The Federal adjustments to the corporation's return were reported to the State in the time required by law, and all taxes on the corporation resulting from said adjustments have been paid. The Federal Government did not at this time adjust the individual returns of the taxpayers for 1942 so as to reflect an increase in the amount of liquidating dividends received by or made available to them.

In the summer of 1946 the Federal Government audited the taxpayers' returns for the years 1943, 1944 and 1945. In auditing these returns for the year 1943, the Federal Government was required under the provisions of the Current Tax Payment Act of 1943 to examine and compute the taxpayers' income for 1942 in order to determine tax liability for 1943. As applied to the taxpayers, the Current Tax Payment Act of 1943 (more popularly known as the "pay-as-you-go" law) required the determination of 1943 tax liability by adding to the tax computed on the 1943 income an amount equivalent to 25 per cent of the tax computed on the 1942 income, and, technically at least, the 1942 tax as such was "forgiven."

Inasmuch as the amount of the 1943 tax liability depended in part upon the amount of the 1942 income, the Federal Government examined the taxpayers' returns of 1942 income and made an adjustment resulting from the increased liquidating dividends effected by the prior 1943 audit of the corporation's return and the 1944 adjustment of corporate income flowing from that audit. This adjustment to the individual returns of the taxpayers consisted of an increase in the gain resulting from the liquidating dividends; and, on the basis of this increased income for 1942, the Federal Government increased the taxpayers' tax liability for 1943 under the provisions of the Current Tax Payment Act of 1943. This action on the part

of the Federal Government was reported to the State within the time required by law, and the Commissioner of Revenue of North Carolina directed an audit which resulted in the proposed assessment which the taxpayers now contest.

It must be conceded at the outset that, in the absence of rights flowing from the Federal change or correction of income, the Commissioner of Revenue would be barred by the statute of limitations from making the proposed assessment with respect to 1942 income. Section 335 of the Revenue Act. If the proposed assessment is to stand, it must do so by virtue of the provisions of Section 334 of the Revenue Act, which reads, in part, as follows:

"If the amount of the net income for any year of any taxpayer under this article, as returned to the United States Treasury Department, is changed and corrected by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within thirty days after receipt of Internal Revenue Agent's report or supplemental report reflecting the corrected net income, shall make return under oath or affirmation to the Commissioner of Revenue of such corrected net income. . . . The Commissioner of Revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer, the same shall be assessed and collected. . . ."

The taxpayers contend that the statutory provisions just quoted do not benefit the Commissioner of Revenue under the facts of this case, and they base that contention upon the assertion that the Federal Government did not make any adjustment or assessment with respect to the taxpayers' 1942 income as such; that the adjustments and assessments were made with respect to 1943 income; that the taxpayers' 1942 tax liability as such was discharged or "forgiven"; that the year 1942 had lost its identity as a separate and distinct taxable period; that 1942 income was referred to only for the purpose of computing a 1943 tax; that the Federal Government itself was barred by the three-year statute of limitations from making any assessment of 1942 tax as such, and the State should not construe its statute so as to give it the effect of extending the State's rights back over a longer period than was available to the Federal Government, from whose action the State's extended right flows; that the taxpayers made a "full disclosure" on their returns to the State that they considered the liquidating dividends non-taxable, and the State should not now seek to reopen the question; and that a fair and reasonable interpretation of the statute can lead only to the conclusion that the taxpayers' income for 1942 has not been adjusted "within the meaning of the statute."

The taxpayers' argument is persuasive but not convincing. I am of the opinion that the matter is controlled by the plain language of the statute, which provides that "if the amount of the net income for any year of any taxpayer . . . as returned to the United States Treasury Department, is changed and corrected by the Commissioner of Internal Revenue . . . the Commissioner of Revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer. . . ." Insofar as the facts of this

case are concerned, the language of the statute is unambiguous and requires no construction. It is not disputed that the Federal Government did change and correct the taxpayers' net income for 1942. The taxpayers contend that, although the Federal Government did change and correct the 1942 income, this change and correction was not within the contemplation of the statute. It seems to me that such an argument attempts to read into the statute something which is not there. Certainly it can be no answer to say that the General Assembly did not contemplate this particular situation when it enacted the statute. In my opinion the exception to the statute urged by the taxpayers cannot reasonably be inferred therefrom.

While it seems unnecessary, in view of the plain language of the statute, to indulge in any exhaustive discussion of the taxpayers' contentions, it seems to me that some of them have sufficient merit to justify a response. For that reason I shall deal with some of these contentions in detail.

The taxpayers urge, with some force, that their 1942 income was changed, not with respect to 1942 tax liability, but for the sole purpose of computing the amount of the 1943 tax. Under the provisions of the Current Tax Payment Act of 1943, it must be conceded that 1942 tax was "forgiven" and that the change of income did not affect "1942 tax liability" as such. However, it seems to me to be unimportant whether the taxpayers' tax liability is designated as a liability for 1942 tax or as a liability for 1943 tax. The fact remains that the 1942 income was changed and corrected and that the change and correction effected a change of tax liability. The fact that tax liability for two years was telescoped into tax liability for one year so as to attribute such liability to one of the years, and thereby alter the relationship of tax liability to the income from which the liability arose, does not, in my opinion, affect the conclusion that here was an additional tax liability arising from a 1942 income which was changed and corrected. This increased tax liability resulted, not from a change of 1943 income, but from a change of 1942 income. To call the tax a "1943 tax" rather than a "1942 tax" does not alter the fact that the assessment of additional tax sprang from a change of 1942 income. Therefore, it seems to me that, even if we concede the correctness of the taxpayers' argument that Section 334 contemplates only those changes and corrections which result in an assessment of additional tax by the Federal Government, the facts of the present case fall squarely within the purview of the statute.

The taxpayers contend also that, since the Federal Government, except for the provisions of the Current Tax Payment Act of 1943, would have been barred by the statute of limitations, the State should not take advantage of the change of income in such a way as to allow the State to extend its right of assessment back for a longer period than was otherwise available to the Federal Government. In this connection the taxpayers rely upon the assumption that, aside from the right to consider the 1942 income for the purpose of computing 1943 tax under the Current Tax Payment Act of 1943, the Federal Government was barred by the three-year statute of limitations as of March 15, 1946. However, it appears to me that in this case, which involved an increase of income resulting from a change of liquidating dividends of a corporation, the applicable statute under the Internal Revenue Code would have been the four-year

statute rather than the three-year statute. See Section 275(e) of the Internal Revenue Code. In that case the State would not be enlarging upon the period available to the Federal Government, for four years from the due date of the return of 1942 income have not expired even as of this date.

Even if the Federal Government had been barred except for the provisions of the Current Tax Payment Act of 1943, the fact remains that that Act authorized the change of 1942 income which was made in this case. There has been no suggestion that such Federal change of income was not lawful. In my opinion it is not encumbent upon the State of North Carolina to inquire into the source of the Federal Government's right or authority to make the change of income which the State uses as a basis for redetermining a taxpayer's income, especially where that right is not challenged by the taxpayer. The right of the Federal Government conceivably could have arisen from a 1943 Act which simply changed the statute of limitations to six years with respect to returns which the existing statute had not then already barred. If that had been the case, it would hardly be contended that Section 334 contemplates only those changes made by the Federal Government within the period named by the Federal statute of limitations in force at the time our statute was enacted. Therefore, it seems to me that, irrespective of whether or not the Federal change of income depended upon a new right granted by the Current Tax Payment Act of 1943, the change of income was lawfully made and comes within the contemplation of Section 334 of our Revenue Act.

I am unable to agree that the taxpayers made "full disclosure" of these liquidating dividends on their returns of 1942 income to the State. Such returns reported the item only as "non-taxable dividends," which discloses nothing which would be calculated to put the State on notice that liquidating dividends were about to escape taxation. Moreover, for present purposes, it seems to me unimportant whether such disclosure was made or not. The function of Section 334 is not so circumscribed.

I am advertent to the fact that the conclusion reached herein embraces the corollary proposition that under appropriate circumstances the State must make refunds of tax where the Federal Government reduces 1942 income in computing "1943 tax" under the provisions of the Current Tax Payment Act of 1943.

The taxpayers, in conclusion, make the additional contention that, even if the State has the right to reopen their 1942 returns, such returns cannot be reopened to any greater extent than the scope of the Federal adjustments. In order to clarify this contention, it may be stated that the taxpayers did not report the liquidating dividends to the State as taxable at all (the returns designating them simply as "non-taxable" dividends), while they did report such dividends as taxable in a specified amount to the Federal Government; and that the Federal change or correction of 1942 income was the result of increasing the amount reported to the Federal Government. The taxpayers contend that the State's right to redetermine their income for 1942 and to assess additional tax on the basis thereof is restricted to the amount of the increase made by the Federal Government, and that the State cannot assess additional tax on the basis of the entire amount of the liquidating dividend as finally corrected by the Federal Government.

In my opinion such a contention is not supported by the statute. It is true that this office has previously expressed the opinion that a Federal change or correction of income does not reopen the taxpayer's return for every purpose without regard to the change or correction made by the Federal Government, although the language does seem broad enough to permit this to be done. However, it has never been thought that the statute has the narrow meaning which the taxpayers now seek to attribute to it. Certainly the State is not restricted in every case to the exact amount of change or to the particular change made by the Federal Government. If the statute had that meaning, it would provide simply that the Commissioner of Revenue should examine the taxpayer's return and decide simply whether the Federal change or correction should be accepted or rejected by the State. The statute does not provide to that effect. It provides that the Commissioner shall "proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer." In my opinion this language will not support an interpretation any more narrow than that which has already been placed on it to the effect that the Commissioner is limited to those matters with which the Federal change or correction is concerned. The matter with which the Federal change or correction is concerned in this case is the correct income realized from the liquidating dividends; and, in my opinion, the State may determine the correct income from these liquidating dividends from such evidence as may be available to the Commissioner.

For the reason set out in this opinion I advise that you should not withdraw the proposed assessments.

LICENSE TAXES; NO LICENSE REQUIRED FOR CLEANING AND MOTH-PROOFING OF FURNITURE IN HOME OF OWNER

22 November 1946

You inquire if a license must be secured by an individual before he engages in the following business:

"We intend to operate in the homes, cleaning and moth-proofing upholstery approximately three days a week, as my partner and I are otherwise employed the remainder of the week. We will have no plant and will operate this business solely within the premises of our customers. The only "plant" that we will use will be our home address in which we will do no work but will use only the telephone in order to contact our customers.

"The process of cleaning the rug, which we will do on the premises, is as follows: first we mix our foam in a special machine and then we spread it on the rug. It absorbs the dirt and is wiped off by special brushes that we use. We then vacuum the rug with a high-powered vacuum cleaner, in order to both dry and remove any of the solution that might be left in the rug. In the process of moth-proofing a rug we use a high-powered sprayer in order to impregnate the fibers to the root. There is a four-year guarantee against moths."

I can find no provision in the Revenue Act which is broad enough to impose a tax upon a business such as the one outlined above. In my opinion, neither Section 139 nor Section 150 has any application.

INCOME TAXATION; REFUND OR ABATEMENT OF AD VALOREM TAXES
TAKEN AS DEDUCTION IN PRIOR YEARS

26 November 1946

You have requested me to advise you of my opinion as to how you should regard, for income tax purposes, the refund or abatement to the taxpayer of *ad valorem* property taxes which he has taken as a deduction in prior taxable years. The taxpayer is E. C. Griffith Company, Charlotte, N. C., a corporation which is represented in this matter by Mr. Elton B. Taylor, attorney at law.

It appears that the taxpayer files his income tax return upon the "accrued" basis, and that the taxpayer reported as accrued, and claimed as deductions, various amounts in fiscal years beginning with 1930 and ending with 1942, represented to be property taxes accrued to Mecklenburg County, and the City of Charlotte, North Carolina. In the taxable year ended November 30, 1943, the taxpayer, which had sustained a net loss in most of the taxable years between 1930 and 1942, reached an agreement with the county and municipal authorities whereby certain portions of the taxes and interest for some of those years were abated.

In order that this matter may be understood, it is necessary at the outset to recognize a distinction between taxes which are legally and properly assessed and/or collected, and taxes which are illegally or mistakenly assessed and/or collected. If the taxes which are refunded or abated were legally and properly assessed, they are held to constitute income in the year in which they are refunded or abated. Thus, if the taxpayer compromises *valid* taxes for which he has taken a deduction, the refund or abatement effected by the compromise is income in the year in which the refund or abatement is made. *COMMISSIONER OF INTERNAL REVENUE v. CENTRAL UNITED NAT. BANK*, (CCA 6th 99 Fed. (2d) 568, 21 AFTR, 1161 (1938)).

On the other hand, if the taxes which are refunded or abated were illegally or mistakenly assessed and/or collected, the treatment of the refund or abatement depends upon whether or not the statute of limitations has barred the right of the State or Government to reopen the tax returns for the prior income year with respect to which the refund or abatement is made. If such right is not barred, an adjustment of the prior year's income is made by disallowing the deduction to the extent of the refund or abatement, *i.e.*, by crediting the amount of the refund or abatement against the claimed deduction. *LEACH v. COMMISSIONER OF INTERNAL REVENUE*, 16 BTA 781 (1929); *INLAND PRODUCTS CO. v. BLAIR*, (CCA 4th), 31 Fed. (2d) 867, 7 AFTR 8631 (1929); *BERGEN v. COMMISSIONER OF INTERNAL REVENUE*, (CCA 2d) 80 Fed. (2d) 89, 16 AFTR 1379; *SIMPSON INVESTMENT CORP. v. U. S.*, (D. C., Mass.) 35 Fed. Supp. 498, 26 AFTR 80 (1940). But if the statute of limitations has barred the right to adjust the prior year's return, the refund or abatement constitutes income in the year in which it is made. *HOUBIGANT, INC. v. COMMISSIONER OF INTERNAL REVENUE*, 31 BTA 954 (1934); *UNION TRUST CO. v. COMMISSIONER OF INTERNAL REVENUE*, 954 (1934); *UNION TRUST CO. v. COMMISSIONER OF INTERNAL REVENUE*, (CCA 7th) 111 Fed. (2d) 60, 24

AFTR 874 (1940); *ELECTRIC STORAGE BATTERY CO. v. ROTHENSIES*, (D.C.E.D. PENN.) 57 Fed. Supp. 731, 33 AFTR 204 (1944); *BIMBERG v. HELVERING*, (CCA 2d), 126 Fed. (2d) 412. See *P-H Federal Tax Service*, 1946, Sections 7370 and 13,134.

There has been no suggestion that the *ad valorem* taxes in the instant case were illegally or mistakenly assessed. I assume that such taxes were validly assessed and were correct in amount, and that the adjustments made by the county and municipal authorities constituted a settlement by compromise rather than a correction of original mistake. If my assumption is correct, it would follow from the authorities cited that each adjustment which resulted in a reduction of accrued tax constituted taxable income, to the extent of the reduction, in the taxable year in which the adjustment occurred.

It appears that the taxpayer has attempted to offset against the amounts which have been abated, certain sums which are labelled as "under-accrued taxes" for prior years. Although there may be some theory upon which the taxpayer may reduce the abated sums by crediting against them other sums representing an increase in taxes for the same years, the taxpayer, in my opinion, has not shown facts which will support such a reduction. I shall be glad to consider any further argument which the taxpayer may care to make on this point. In the meantime, however, I must conclude that the taxpayer must include as taxable income the *gross* amount of taxes abated by the county and city, undiminished by any adjustments which the taxpayer has made on his own books with respect to taxes for the years in question. At the present time I am unable to perceive how "under-accrued taxes" for a prior year can affect the amount of a refund or abatement in the present year, at least where the refund or abatement does not exceed the accrued taxes claimed as a deduction in the prior year. The refund or abatement in 1943 constitutes 1943 income in this case, not a reduction of the prior year's income. I know of no principle upon which 1943 income can be reduced by an adjustment of a prior year's deduction. Moreover, the statute of limitations has barred the taxpayer's right in this case even to make any adjustment of the prior years' returns.

The taxpayer contends that the State should not assess additional income tax on account of the abatement of taxes for prior years, because the taxpayer had a net loss in these years and derived no tax benefit from the deduction of accrued taxes in the prior years. This argument has a moral value, and might prevail with respect to Federal income tax on account of a special provision of Section 22 (b) (12) of the Internal Revenue Code. See *P-H Federal Tax Service*, 1946, Sections 7352 and 7357. However, I am not advertent to any comparable "tax benefit rule" in our Revenue Act, and it is my opinion that, for purposes of determining the taxability of income resulting from tax abatements and refunds, it is not material whether or not the deduction of the tax in the prior year resulted in a tax benefit to the taxpayer. Each taxable year stands alone. Thus, if this abatement is 1943 income, it can make no difference that the abated tax, when paid or accrued and taken as a deduction, did not affect the taxpayer's tax liability for some prior year. The refund or abatement is still income when made. The "tax benefit rule" is special relief which is given by Federal statute, and which otherwise would not be available. In my opinion, our Revenue Act does not grant similar relief.

For the reasons stated herein, I am of the opinion that the abatement of prior years' taxes to this taxpayer constitutes taxable income in the year in which the abatement occurred; and, in the absence of a further showing, I am of the opinion that such abatement cannot be reduced by "under-accrued" taxes for the prior years.

INCOME TAXATION; FAMILY PARTNERSHIPS

3 December 1946

You have requested me to advise you with respect to how you should regard family partnerships which have been disallowed by the Bureau of Internal Revenue for purposes of Federal income taxation.

In many cases the Bureau of Internal Revenue has disallowed, and continues to disallow, family partnerships which are formed and employed as a device for splitting a single income into several incomes so as to obtain the advantage of the lower tax rate brackets. The Supreme Court of the United States has held that, under appropriate circumstances, the Bureau's action will be sustained. *COMMISSIONER OF INTERNAL REVENUE v. TOWER*, (1946) 90 L. ed. 559; and *LUSTHAUS v. COMMISSIONER OF INTERNAL REVENUE*, (1946) 90 L. ed. 567. These decisions are to the effect that, where the so-called partnership is a sham, and the wife does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the Federal revenue laws; and, that, if the income in truth is that of the husband, any attempt to divide the income between husband and wife as "partners" will not be recognized, even though such a partnership may be valid under the laws of the State in which it was created.

In my opinion, it is possible to create a legal partnership between husband and wife in North Carolina. See *BRISTOL GROCERY CO. v. BAILS*, 117 N. C. 298; *STONE v. McLAMB & CO.*, 153 N. C. 378. Also see C. B. June 1928, p. 104. But the fact that a husband and wife may legally form a partnership under North Carolina law and have complied with all the requisite formalities to that end, does not mean that such partnership is valid for purposes of income taxation. If the husband and wife (or any other members of the family) do not intend by their agreement to form a real partnership, then compliance with formalities will not render it one. For purposes of income taxation, the issue is who earned the income; and that issue will not be determined by the form which the matter assumes. As was said by the United States Supreme Court, "by the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units."

Therefore, I am of the opinion that you have the right to enquire into the facts of each case and to disallow any partnership which is found to be a mere sham and device to divide a single income. I am further of the opinion that, since there is no essential difference between the standards to be used by the State and those used by the Federal Government, you will

be amply justified in accepting, at least tentatively, the finding of the Federal Government on this point in any given case, subject, of course, to your right to make an independent investigation in an appropriate case. See Section 318 of the Revenue Act, which provides that you shall follow the Federal practice unless it is contrary to the intent of our law.

INCOME TAXATION; FOREIGN CORPORATIONS; DOING BUSINESS; SELLING
GOODS IN THIS STATE THROUGH "INDEPENDENT CONTRACTOR"
WHO IN FACT IS AGENT

18 December 1946

You have referred to me a letter from Winston, Strawn and Shaw of Chicago, dated December 9, 1946, with the request that I advise you of my opinion with respect to the matters presented therein.

It appears that a foreign corporation contemplates effecting the sale of their product in this state through a person whom they choose to call an "independent contractor." The corporation's plan contemplates that the general manager in Chicago will contact a person in North Carolina to be a dealer for the sale of the corporation's products. The dealer will have complete power and control over his employees, and he will lease his own property and pay rent from his own funds. He will, however, be required to sell the foreign corporation's product at a fixed price, and make weekly reports to the corporation with respect to all sales of the corporation's products. The products will be shipped to the dealer f.o.b. Chicago, and the corporation will receive from the dealer a receipt which makes the dealer a trustee of the property, and which states that the title to the property remains in the foreign corporation. On the sale of the products the dealer forwards the complete sale price to the foreign corporation, which, in turn, returns to the dealer his commission.

Under these circumstances, it is my opinion that the foreign corporation would be doing business in North Carolina, because in my opinion the dealer described above more closely approximates the character of an agent than that of an independent contractor. The act of calling the dealer an independent contractor will not alter his true character.

Your inquirers ask further whether or not it would make any difference if the foreign corporation forwarded the product to the dealer on consignment. The exact manner of shipping these goods on consignment does not appear; however, I will state that in my opinion it is possible for goods to be shipped on consignment in such a way that the corporation will not be deemed to be engaged in business in this state. See *P-H State and Local Tax Service*, Vol. 1, paragraphs 7500, 7501 and 7503.

LICENSE TAXES; LAUNDRIES; SELF-SERVICE LAUNDRIES

20 December 1946

You have referred to me a letter from Mr. Tom Carter of the firm of Ratcliff, Vaughn, Hudson & Ferrell, and have requested my opinion on the question presented therein.

It appears that Mr. Carter's client, hereinafter called the taxpayer, rents a building in the city of Winston-Salem in which twenty-one washing machines are kept. The taxpayer does not do any actual washing or cleaning of clothes. However, individuals bring their laundry to the building of the taxpayer, and the taxpayer permits them to use one of his washing machines for a specified rate per hour. The question is whether or not the taxpayer is liable for a license or privilege tax under the present Revenue Act.

I am of the opinion that the taxpayer is liable for a privilege tax under Section 150 of the Revenue Act. In my opinion, Section 119 has no application. It is true that the taxpayer does not himself wash or clean any linens or clothes. However, the taxpayer is engaged in the business of operating a place where clothes are washed. This is engaging in the business of operating a laundry. "Laundry" is defined as a place where clothes are washed. *36 C.J., p. 957*. The fact that a portion or all of the labor involved in the washing of the clothes is furnished by the owner of the clothes, instead of the taxpayer, does not alter this conclusion.

I do not believe that the taxpayer is engaged in the business of renting washing machines as that phrase is used in Section 119. Section 119, read as a whole, clearly discloses an intent on the part of the legislature to tax a type of business which serves as a substitute for a sale of the products enumerated therein. The taxpayer does not fall within this category. On the contrary, taxpayer is performing a service. He explains and demonstrates how the machines which he allows other persons to use are operated. He never parts with possession of the machines. He merely permits other persons to use his machines.

I, therefore, advise that, in my opinion, the taxpayer is liable for the tax levied by Section 150 of the Revenue Act.

GASOLINE TAXATION; REBATES PAYABLE ONLY TO PERSON, ASSOCIATION,
FIRM OR CORPORATION MAKING APPLICATION FOR PERMIT

27 December 1946

You have referred to me a letter dated November 18, 1946, from Mr. J. B. McCoy, chief accountant for a joint adventure operating as Contractors' Contract NOy-4750. This joint adventure has requested you to rebate taxes on gasoline used for non-highway purposes under the provisions of G. S. 105-446.

This joint adventure consists of the following three corporations: Goode Construction Corporation, Blythe Brothers Company, and Harrison-Wright Company, all of Charlotte, N. C. It appears that these three corporations were awarded a contract in April, 1941, for certain construction work at Camp Lejeune, N. C. In performing the contract the joint adventure purchased and used certain quantities of gasoline for non-highway purposes. However, prior to using said gasoline the joint adventure failed to file with your Department an application in its name under the provisions of G. S. 105-446. On the other hand, Blythe Brothers Company, one of the co-adventurers, had therefore received a regular permit for such gasoline as it might use consistently with the facts stated in its own application to your Department.

The joint adventure contends that the equipment which was actually used in the performance of its contract was, in fact, owned by Blythe Brothers Company, and that inasmuch as Blythe Brothers Company prior to the use of the gasoline had made application and received its own permit for the use of gasoline for non-highway purposes, the joint adventure should be allowed to receive the rebate under the name of Blythe Brothers Company; or rather, that Blythe Brothers Company should be allowed to receive the rebate in its own name.

I regret that I am unable to agree with the contentions made by the taxpayer in this case. The statute, G. S. 105-446, seems to me clearly to require as a condition precedent to any rebate an application for a permit from the "person, association, firm or corporation" who or which uses the gasoline and requests the rebate. It seems clear to me that the joint adventure is an association or a firm within the meaning of the statute, and that in order to entitle such association or firm to a rebate it must appear that such association or firm in its own name has made the proper application. The joint adventure, in my opinion, has not complied with this condition precedent simply by reason of the fact that one of its members, a separate business entity, had made application and received a permit with respect to gasoline purchased for its individual use.

I am also of the opinion that Blythe Brothers Company, as an individual corporation apart from the joint adventure of which it is a member, is not entitled to the rebate for the reason that it appears that the gasoline in question was used not by Blythe Brothers Company in its individual corporate capacity, but by the joint adventure, a separate business entity.

In order that the taxpayer may be advised as to this matter without further delay, I am sending it a copy of this opinion.

INCOME TAXATION; FOREIGN CORPORATIONS; DOING BUSINESS

3 January 1947

You have submitted to me a statement from Golden State Sales Corporation with the request that I advise you whether or not, on the basis of this statement, "this foreign corporation is doing business in North Carolina."

It appears from the statement that the corporation has a resident agent in this state selling goods to residents of this state from stock kept in a warehouse in this state.

In my opinion these facts clearly indicate that the corporation is doing business in this state and that all such sales are "North Carolina sales." This conclusion is not altered by the fact that the contracts or orders are handled and approved in an office outside of this state. See *P-H State and Local Tax Service*, Vol. I, Paragraph 7524 et seq.

INCOME TAXATION; DEDUCTIONS; INTEREST ON INDEBTEDNESS OF SUBSIDIARY TO PARENT CORPORATION

3 January 1947

You have referred to me a letter dated December 19, 1946, from Mr. Harry Levine, Attorney and Counsellor at Law, 30 Rockefeller Plaza, New York, who represents RKO Pictures, taxpayer. It appears that the tax-

payer contends that, in determining the proportion of interest which it should be allowed to deduct, you should take into consideration not only the borrowed capital of the parent corporation but also the borrowed capital of all the subsidiaries of the parent corporation. The taxpayer bases its contention on the fact that the statute, Section 318½ of the Revenue Act, provides that "the term 'parent corporation' shall include any subsidiary of the parent corporation."

I am advertent to the general rules of construction which are reviewed in Mr. Levine's letter. Nevertheless, it seems clear to me that the legislature intended by this definition of a "parent corporation" merely to include subsidiary corporations in that class of lending corporations on account of an indebtedness to which an interest deduction would not be allowable. In the pertinent paragraph the legislature stated simply that interest payable to certain corporations could not be deducted; and among those corporations were the parent corporation of the borrowing subsidiary and all other subsidiaries of the parent corporation. It is to be observed that the provision that the term "parent corporation" shall include any subsidiary of the parent appears after the prohibitory provisions relative to the deduction of interest on indebtedness owed to or guaranteed by the parent corporation, and that said provision appears in the paragraph prior to the provisions relating to borrowed capital.

The purpose of this paragraph is to prevent a deduction of interest upon an indebtedness which, in substance, is nothing more than a transfer of capital to the subsidiary doing business in this state.

For the reasons stated herein I am of the opinion that in determining the borrowed capital of the "parent corporation" (which may be either the parent corporation or one of its subsidiaries, depending upon which one makes or guarantees the loan), only the borrowed capital of the lending or guaranteeing corporation may be considered.

BEVERAGE CONTROL ACT; REVOCATION OF LICENSE

4 January 1947

You have referred to me a letter from Falls and Falls, Attorneys at Law, Shelby, N. C., dated December 28, 1946, which contains an argument to the effect that you should cancel your revocation of the license of James A. Balmoutis. Your revocation was based on a transcript of Judgment from the Recorder's Court of Cleveland County, showing that the defendant, James A. Balmoutis, was convicted of selling unapproved wines in violation of G. S. 18-113.1.

I have examined carefully the arguments advanced by the taxpayer's attorneys, and I am of the opinion that the revocation is valid and should not be cancelled. It seems to me that the revocation in this case can be sustained upon either of two grounds:

(1) Section 514½, par. (5), (G. S. 18-78.1) prohibits the sale "of any kind of alcoholic liquors the sale or possession of which is not authorized under his license." His license did not authorize the sale of wines not on the approved list, since sale of such wines is made unlawful by G. S. 18-113.1. The court record shows a conviction under G. S. 18-113.1. In my opinion this is equivalent to a conviction of selling "alcoholic liquors the

sale or possession of which is not authorized under his license"; and, therefore, the conviction would be for a "violation . . . of any provision of this article . . ." within the meaning of Section 514 (G. S. 18-78).

(2) In my opinion the sale of unapproved wines in violation of G. S. 18-113.1 is also a violation of the Turlington Act (G. S. 18-1 *et seq.*) which is still in force except as sale, etc., of alcoholic beverages are expressly allowed by other provisions of law. Thus, any sale not permitted by other provisions of law is in violation of the Turlington Act, which is a "prohibition law." Therefore, it is my opinion that sale of unapproved wines is "a violation of the prohibition laws" within the meaning of Section 514 (G. S. 18-78).

Aside from the Turlington Act, it would seem that a violation of G. S. 18-113.1 would be a violation of a "prohibition law."

INCOME TAXATION; FOREIGN CORPORATIONS; INCOME FROM
PARTNERSHIP IN TAXING STATE

8 January 1947

You have requested me to advise you of my opinion upon the following facts:

O. W. Dudley Company, Inc., the taxpayer, is a Georgia corporation. During the taxable years in question it was a partner in a partnership (of the same name without "Inc.") comprised of itself and an individual resident of North Carolina. The corporation had a two-thirds share in the partnership, and the individual had a one-third share. The partnership during the taxable years in question engaged in the business of warehouse selling of tobacco on commission in this state. It did no business outside this state. The corporation did no business in this state outside its capacity as a partner in the partnership. In the State of Georgia the corporation engaged in a business similar to that in which the partnership engaged in North Carolina. The corporation received, during the taxable years in question a net income, both from its Georgia business and its interest in the North Carolina partnership.

You wish to be advised as to the appropriate basis for taxing the net income of this corporation in this state.

The answer to your question is controlled, in my opinion, by a ruling heretofore issued by this office to the effect that when a foreign corporation doing business in North Carolina earns a part or all of its income as a member of a partnership, the allocation fraction should be determined by attributing to the corporation its proportionate part of the partnership property, costs, sales or gross receipts, as the case may be.

In my opinion the Georgia corporation is doing business in North Carolina when it carries on business here under a partnership arrangement. The fact that it does its business with an individual does not change the essential fact that it is doing business. In this case the principal business of the corporation in this state is the auction selling of tobacco through the partnership. In determining the allocation fraction for apportionment of income, it is my opinion that you should attribute to the corporation two-thirds of the partnership property and sales, as well as two-thirds of the net income. When the allocation fraction is determined, it should be applied to the corporation's entire net business income.

INCOME TAXATION; DOMESTIC CORPORATIONS; INCOME FROM RENTAL OF
EQUIPMENT USED IN ESTABLISHED BUSINESS OF SAME
CORPORATION IN ANOTHER STATE

9 January 1947

You have requested me to advise you of my opinion upon the facts hereinafter stated. Your request concerns Boyd & Goforth, Inc., hereinafter referred to as the taxpayer.

The taxpayer is a North Carolina corporation engaged in the business of general contracting. Its principal office is in Charlotte, N. C. During the taxable year 1944 the taxpayer performed contracts with the United States Government in North Carolina, South Carolina, Georgia and Florida.

The taxpayer's income tax return for the taxable year 1944 treated the performance of government contracts in each of the aforementioned states as a separate business and allocated to each of said states that part of its total net income alleged by the taxpayer to have been earned there. However, said return showed losses instead of income in two of the states, South Carolina and Georgia.

With respect to South Carolina operations, the taxpayer's return for the taxable year 1944 showed a gross contract loss of \$1,505.48. In order to arrive at total net loss from South Carolina business, the taxpayer added to this contract loss "net deductions" of \$1,215.13, representing the amount by which certain deductions exceeded "other income." The result of adding contract loss and "net deductions" was a total loss from South Carolina business of \$2,720.61. The deductions included a proportionate part of the entire corporate overhead and general expenses allocated to the South Carolina business by a fraction determined by the ratio which the South Carolina gross income bore to the entire corporation gross income.

With respect to Georgia operations, the taxpayer's return for the taxable year 1944 showed a gross contract loss of \$40,679.79. In order to arrive at a total net loss from Georgia business, the taxpayer added to this contract loss "net deductions" of \$7,690.00, representing the amount by which certain deductions exceeded "other income." The result of adding contract loss and "net deductions" was a total loss from Georgia business of \$48,369.79. The deductions included a proportionate part of the entire corporate overhead and general expenses, allocated to the Georgia business by a fraction determined by the ratio which the Georgia gross income bore to the entire corporate gross income.

Thus, on its return the taxpayer treated its South Carolina loss and its Georgia loss in the same manner.

There appears to be no disagreement between the taxpayer and the Department as to the taxpayer's general method of allocating its income (and losses) among the various states in which it does business. Indeed, since the taxpayer is conceded to have had an "established business" in South Carolina and in Georgia, it is recognized that some reasonable method of allocation is necessary under Section 322 (10) of the Revenue Act as amended through 1943, which allows to domestic corporations a deduction of net income earned from an established business in another state which levies a tax upon such net income. While this statute provides in form for a deduction, in substance it establishes a method of direct allocation of income among the various states in which the domestic corporation does

business, with the limitation that North Carolina income cannot be reduced thereby. Therefore, it is agreed that in this case it was appropriate for the taxpayer to attribute or allocate to the various states the income earned or the loss sustained in each.

However, you do question the taxpayer's treatment of certain items in arriving at the amounts allocable to South Carolina and Georgia. It appears that in performing its government contracts in South Carolina and Georgia the taxpayer used certain construction equipment belonging to itself. If the operations in South Carolina and Georgia had yielded a net profit in a sufficient amount, the taxpayer would have transferred from that profit to the North Carolina business certain amounts as "equipment rentals." These "equipment rentals" would have represented reasonable amounts charged by the North Carolina office to the South Carolina and Georgia contracts. It appears that this would have been consistent with good accounting practice, as it would have given a true picture of the cost of performing the contracts. It seems clear that if such amounts had been so transferred from contract profit to the North Carolina office, they would constitute North Carolina income. It also seems clear that such amounts would be allocable to North Carolina rather than to any other state because of the fact that the equipment for which rental was charged was attached to the North Carolina business and not to an established business in any other state. Section 322 (10) of the Revenue Act, as amended through 1943, provides a deduction as to net income earned from an established business in another state which taxes such net income. Under any view of the matter, it could not be said that these equipment rentals constituted income earned from an established business in South Carolina and Georgia.

But the taxpayer did not earn a net income in South Carolina or in Georgia; it suffered a net loss in each of those states. The taxpayer's gross contract loss in South Carolina was reported in its income tax return as \$1,505.48. The corresponding contract loss in Georgia was similarly reported as \$40,679.79. Each of these figures included a cost item of "equipment rentals." This additional cost item boosted the reported South Carolina contract loss to the extent of \$1,210.40 and the reported Georgia contract loss to the extent of \$11,900.10. This additional cost item was not actually paid, for the same represented a debt from the taxpayer to itself, and there was no contract profit to transfer on the books to the North Carolina business of the taxpayer. However, in order to justify the adding of this item to contract cost, the taxpayer found it necessary to show it elsewhere as income, for otherwise the books would not balance. To show equipment rentals as income to the taxpayer's North Carolina business would entail additional North Carolina taxes. Presumably for that reason the taxpayer balanced his books by showing this item as income, not to North Carolina business, but to South Carolina and Georgia business. By crediting the item as income the taxpayer was enabled to debit the item as an expense or cost of performing the contract and thereby swell the contract loss to the figure shown in its income tax return.

This method occasioned use of the "equipment rentals" item in at least three ways: (1) In boosting contract losses in South Carolina and Georgia, (2) In boosting the fraction which was used to allocate corporate over-

head and general expenses (said fraction being based on allocation of income to the various states), and (3) In boosting "other income," (*i.e.*, income other than contract income) in South Carolina and Georgia, and thereby reducing total net loss (but not "contract loss") in those states. Essentially what the taxpayer did was to charge the South Carolina and Georgia contracts with rental upon the equipment which was used on the contract jobs, and, at the same time treat the rental as income to the South Carolina and Georgia business as such. The effect of this was to increase the contract losses and, at the same time, to decrease the total net losses in those two states.

The particular phase of the foregoing to which you have objected is that part of the taxpayer's return which shows allocation to South Carolina and Georgia of income which, if allocable to any state, is allocable to North Carolina. The equipment rental income, if it exists, belongs to the taxpayer's North Carolina business. The taxpayer answers that such income does not actually exist; that the figures are fictitious; that they are mere bookkeeping entries; that they were made "merely for the purpose of more closely indicating the true cost and the true loss sustained on the contracts themselves" and that "they had no effect on the profit and loss as a whole, and not a single penny in income was gained by these adjustments." There is a suggestion that the taxpayer's purpose in making these entries was to boost contract losses in order to improve its position before the Federal Government in renegotiation of contracts. The only way in which this could be done was to show a corresponding credit in the form of income, and this was credited to the South Carolina and Georgia businesses to avoid additional taxes in North Carolina. Of course, by attributing such income to South Carolina and Georgia, the taxpayer reduced its *total net loss* in each of those states; but that did not hurt its case before the Federal authorities, for there it would use the figure which represented *contract* losses, not *total net losses* from all business done in those states. By this device it contends that it credited fictitious income where it was harmless to do so, and, at the same, made advantageous use of the corresponding debit to boost its contract losses. The taxpayer's only concern was with the boosting of the contract losses; and it was not important that by doing this it was necessary also to decrease total net losses in the two states involved.

Assuming the correctness of the taxpayer's contention that the allocation of equipment rentals to South Carolina and Georgia was a mere bookkeeping entry and that the figures were purely fictitious, it seems to me that you cannot accept the return as filed. It may be that you can accept the taxpayer's explanation of entries upon his own records in this case, for it must be recognized that good accounting practice permits the use of entries under some circumstances which are fictitious and which are used for the purpose of reflecting desired information. However, it seems to be quite another matter to accept fictitious amounts upon a taxpayer's income tax return, especially when those amounts are shown to be allocated in a manner contrary to our law. It appears to me that if the taxpayer shows upon its return that it has allocated to South Carolina and Georgia certain income which is allocable to North Carolina, it is your duty either to reject the return as filed or to make an assessment based upon a correct allocation of those amounts to North Carolina. If the tax-

payer reports in its return any income from equipment rentals, it is my opinion that such income should be allocated to the proper state. It is my further opinion that as long as the taxpayer insists upon showing such income upon its return, it is estopped to deny that such income exists. The income tax is computed upon the basis of information contained in the return, and the taxpayer should not show in its return that it received certain income and then expect the Department to compute the tax upon the basis of an oral assertion that the return does not speak the truth.

The question here is not free from difficulty. However, if the taxpayer is able to show to your satisfaction that the equipment rental income is fictitious and was actually not received, I am inclined to the view that the taxpayer's remedy is to amend its return to eliminate these fictitious amounts. You could then accept the return as correct and compute the tax accordingly. I see no reason to quarrel with the manner with which the taxpayer keeps its own books and records if you are convinced that no fraud is practiced upon the State of North Carolina, and if such books and records, when explained, will support the return filed with your office.

It appears to me that all that you can require is that the taxpayer's return be correctly made and that such return be supported by satisfactory records. In this case it appears that the taxpayer's return is not correct, for North Carolina income is reported as being allocable to South Carolina and Georgia. If no such income actually existed, the tax may be avoided by correcting the record to speak the truth.

INCOME TAXATION; MEDICAL DEDUCTION; TRAVEL EXPENSES OF PARENT
WHO ACCOMPANIES CHILD TO HOSPITAL

11 January 1947

You have referred to me a letter written to you under date of January 2, 1947, by Frank P. Meadows & Co., Accountants, Rocky Mount, N. C. This company requests advice upon the following facts:

"The taxpayer has a daughter who is now five years old. The child became ill and the local doctors were unable to determine the cause of her illness. They referred her to a doctor in Wilmington who in turn referred them to doctors in Richmond who in turn referred them to doctors at Duke Hospital and finally went to Johns Hopkins in Baltimore. It was there found that a weighed diet would correct her illness. It has been necessary for her to make frequent trips to Baltimore in order that the diet might be checked and changed according to her growth. There have been times when she was an ambulatory patient. Due to her age it was impossible to allow her to make these trips alone, she could not be left in Baltimore alone and it has been necessary for the mother to accompany her on each of her trips and stay for the duration of her visit. This has necessarily entailed hotel and transportation expenses which have definitely been a part of the child's medical care. The question arises as to whether these necessary hotel and transportation expenses would be allowable deductions from the income of the taxpayer father."

Section 322 (7½) of the Revenue Act (G. S. 105-147) allows a deduction with certain limitations with respect to "amounts expended by an individual during the year for medical care and insurance against illness or accident for himself or herself and dependents."

It seems that under the Federal law a deduction would be allowed under the facts stated in the paragraph quoted above. Federal authorities have ruled that traveling expenses, including expenses of meals and lodging, incurred on behalf of a minor child in order to obtain medical care for the alleviation of a physical defect or illness, are deductible for Federal income tax purposes as medical expenses under Section 23 (x) of the Internal Revenue Code; and that if it is necessary for one of the parents to accompany the child because of its physical condition and immaturity, reasonable expenses incurred for travel (including expenses of meals and lodging) of the parent are also deductible as medical expenses. I. T. 3786, reported in *P-H Federal Tax Service*, 1947, paragraph 11,479.

In your construction of our Revenue Act you are not bound by Federal regulations or Federal rulings. However, it seems to me that where the language of our Act is substantially similar to that of the Federal Act, Federal rulings and regulations are at least persuasive and should be considered by you in the interpretation of our Act. There seems to be no essential difference between the language used in Section 23 (x) of the Internal Revenue Code and Section 322 (7½) of our Revenue Act. In my opinion there is no essential difference between the two laws with respect to the particular question involved here. It is, therefore, my opinion that the Federal ruling should be adopted as the correct interpretation of the corresponding provision of our Revenue Act.

INCOME TAXATION; DEDUCTIONS; LOSS BY REASON OF MISAPPROPRIATION OF GUARDIANSHIP FUNDS

13 January 1947

At your request I have read and considered the affidavit filed with you by Mr. Allston Stubbs, taxpayer, who has submitted such affidavit in support of his contention that he is entitled to a deduction in the taxable year 1943 on account of the fact that when he was a minor his guardian misappropriated guardianship funds and has never restored said funds to the taxpayer.

The facts contained in the affidavit are certainly sufficient to provoke the sympathy of anyone who reads the same. However, I have been unable to classify this loss as one of those which are deductible under Section 322 (6) of our Revenue Act. It appears that the guardian in each case gave a note and mortgage evidencing his debt to the guardianship estate with respect to all funds taken and used by him. Under these circumstances I do not believe that the use of the guardianship funds by the guardian could be considered a theft or casualty within the meaning of the statute, even though loss resulted from such taking. Moreover, the loss, if arising out of theft or casualty, cannot be said to have been sustained in the taxable year 1943, for the guardian took the guardianship funds prior to that time. The fact that the guardian died in 1943, thereby terminating all future chance of recovering the loss, would not alter this conclusion. If any theft or casualty occurred, it occurred prior to 1943.

I am further of the opinion that the loss is not deductible even as a bad debt charged off in 1943, because it was not connected with business as required by Section 322 (7) of the Revenue Act.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME; RENEGOTIATION OF
FEDERAL CONTRACTS

13 January 1947

You have requested me to advise you of my opinion with respect to a taxpayer's rights under Section 334 of the Revenue Act where he has failed to file claim for refund required by Income Tax Regulation No. 1, relating to adjustment of income tax liability of taxpayers whose contracts with the Federal Government have been or may be renegotiated.

Although a taxpayer whose contracts have been renegotiated has failed to file claim for refund within three years under Section 340, as amplified by the regulation of July 16, 1943, it is my opinion that if the amount of his net income for any year, as returned to the United States Treasury Department, is changed and corrected by the Commissioner of Internal Revenue or other United States officer of competent authority, such taxpayer may be entitled to a refund under Section 334 if the following two conditions are met: (1) that the taxpayer has given the Commissioner the required notice of thirty days "after receipt of Internal Revenue Agent's report or supplemental report," and (2) that the Commissioner has determined, "from such evidence as he may have brought to his attention or shall otherwise acquire," that the taxpayer's net income for the year in question is less than that amount on which he computed and paid his taxes. In short, it is my opinion that if the conditions of Section 334 are met, the taxpayer is not barred by the statute of limitations from making claim for refund based upon a Federal change of net income, in turn based upon a renegotiation of contract. The Commissioner's recognition of the taxpayer's claim would spring, not from the fact of renegotiation, but from a Federal correction of income under Section 334 which, in effect, requires a new return to be filed showing corrected income. If the new return is duly filed, the taxpayer's right to refund may be examined even though Section 340 has already barred him with respect to the original return for that year. However, it should be made certain in each case that the matter is one which is covered by Section 334 and that the requirements of that section have been strictly met.

INCOME AND FRANCHISE TAXATION; EXEMPTIONS; MARKETING AND
COOPERATIVE ASSOCIATIONS

3 February 1947

You have referred to me the charter and by-laws of Producers' Cooperative Association, Inc., Winston-Salem, N. C., and have requested me to advise you whether or not this corporation is liable for income and franchise taxes under our Revenue Act.

It appears that this corporation was organized and is now operating under Subchapter V of Chapter 54 of the General Statutes, entitled "Marketing Associations." These associations are declared by statute to be non-profit [G. S. 54-130]. They are expressly exempted from all franchise and license taxes, except for an annual fee of \$10.00. [G. S. 54-143]. They are also expressly exempt from income tax [G. S. 105-138 (9)].

Accordingly, I am of the opinion that this corporation is not liable under our Revenue Act for either income taxes or franchise taxes.

INCOME TAXATION; SEC. 324; EXEMPTION; "HEAD OF A HOUSEHOLD"

18 February 1947

I have your letter of February 4, 1947, attaching protest of Fabias H. Briggs, taxpayer.

It appears that the taxpayer claims the exemption provided in G. S. 105-149 for "head of a household." The taxpayer does not reside in the particular household of which he claims to be the head, although he supports in said household the required number of dependent relatives. He maintains a separate residence for himself on account of the condition of his health. There is evidence tending to show that the condition of his health is sufficient justification for maintaining a separate household for himself.

In my opinion the taxpayer's right to the exemption which he claims is precluded by the fact that he maintains a separate household and does not live in the household of which he claims to be the head. It seems to me that this conclusion should not be altered by the fact that there exist adequate reasons for his not living in said household. It is my opinion that our statute contemplates as "head of a household" a person who either lives in the household or maintains such a close connection with the business of running said household that he must be deemed for all practical purposes to be the active head of the same. It does not appear to me that maintenance and consanguinity when taken in conjunction with one another are themselves sufficient to constitute a person "head of a household."

There being no evidence that the taxpayer either resided in this household or maintained such a close connection with the business of running said household as to render him the active head thereof, I am of the opinion that you should deny the exemption.

I am informed that the Federal Government has allowed this exemption; however, your attention is directed to the fact that the Federal statute during the taxable years involved provided that the exemption should apply to the "head of a family" rather than "head of a household." It seems to me that there is a difference between these two provisions.

LICENSE TAXATION; COIN-OPERATED RADIOS; APPLICATION OF SECTION 130

20 February 1947

You have requested me to advise you whether or not in my opinion the \$100.00 privilege tax and \$10.00 per machine tax required by Section 130 of the Revenue Act must be paid by an individual who is engaged in the business of placing coin-operated radios in hotel rooms. These radios will remain in the hotel rooms in which placed, and may be played continuously or intermittently by the insertion of a coin. Experience shows that each coin-operated radio will gross approximately \$3.00 per month or \$36.00 per year.

I am of the opinion that such radios are not machines which produce music within the meaning of Section 130 of the Revenue Act. I, therefore, advise that, in my opinion, the \$100.00 privilege tax and the \$10.00 per machine tax is not due to the State by an individual engaged in the business outlined in the preceding paragraph.

Numerous conferences have been held with Mr. John Anderson, attorney for the taxpayer, and the authorities bearing on the question involved may be found in a memorandum submitted by Mr. Anderson. This memorandum contains authorities found by Mr. Spruill and me, as well as those discovered by Mr. Anderson. I see no reason for listing and discussing the authorities contained in that memorandum in this letter. A copy of this memorandum, however, is available to you for examination at any time.

INCOME TAXATION; DEDUCTIONS; CONTRIBUTIONS TO VETERANS'
MEMORIAL PARK, INC.

20 February 1947

You have requested my opinion as to whether or not contributions made to Veterans' Memorial Park, Inc., are deductible from the gross income of donors in computing their net income for income tax purposes. Veterans' Memorial Park, Inc., hereinafter called donee, is a corporation organized under Chapter 55 of the General Statutes, and the incorporators are ten members of an American Legion Post in Mount Airy and ten members of Veterans of Foreign Wars Post in the same city. Donee is a non-stock corporation incorporated for the following purposes and with the following powers:

"To operate and conduct a recreation and amusement park, horse shows, baseball games, football games, and other sports; to buy, lease or otherwise acquire land and to erect upon the same an athletic park, in which may be held all kinds of athletic games for pastimes; to equip same with fence, grandstands, bleachers, club houses; to conduct and maintain a social club for the amusement and recreation of members of the Jesse B. Jones Post #123 of the American Legion and members of Post #2019 of the Veterans of Foreign Wars; to promote social intercourse among the veterans of all wars in which the United States has participated, and to provide rooms in which they can meet for recreation and amusement; to receive and accept gifts from any persons, firms or corporations; to hold, acquire and use all kinds of property, real and personal, in order to carry out the purpose of said corporation.

"And in order to properly prosecute the objects and purposes above set forth, the corporation shall have full power and authority to sell, purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property, both real and personal both in this State and in all other states, and generally to perform all acts which may be deemed necessary for the proper and successful prosecution of the objects and purposes for which the corporation is created."

Any and all profits made by donee are to be used by the donee for the purposes above set forth, and upon a dissolution of the donee, one-half of the assets are to be turned over to the American Legion Post in Mount Airy and one-half to the Veterans of Foreign Wars Post in the same city.

To be deductible under paragraph 9 of Section 322 of the Revenue Act contributions or gifts must be made within the income year "to corporations . . . or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual." Upon the information submitted to me, I am unable to reach the conclusion that donee is a corporation organized and operated exclusively for any of the purposes mentioned above. In order to allow donors to deduct contributions to this donee, donee must qualify as a corporation organized and operated exclusively for one or more of the abovementioned purposes. As stated above, the evidence submitted to me does not convince me that donee is so organized and operated. In Cumulative Bulletin No. 1, page 150, Office Decision 104, the following appears:

"Contributions made for the purpose of purchasing land and improving same for use as a public park or recreation ground, which is to be dedicated as a memorial to soldiers and sailors who served in the late war, are not deductible for income tax purposes."

I am advised that contributions to donee have been allowed as deductions from gross income of donors in computing Federal income taxes due. This ruling is urged as a reason for allowing a deduction of these contributions in computing North Carolina income taxes. This ruling, however, is based upon an express provision of the Internal Revenue Code. Paragraph (4) of Section 23 (c) authorizes deductions for contributions to or for the use of "posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual."

It may be that donee may qualify so as to allow donors to deduct from gross income for North Carolina income tax purposes contributions made to donee. Upon the evidence submitted to me, however, I am unable to reach that conclusion.

INCOME TAXATION; TAXABILITY OF NATIONAL SECURITIES SERIES DIVIDEND

21 February 1947

You have requested me to advise you with respect to the questions contained in a letter of December 23, 1946, from National Securities & Research Corporation.

The question raised in this letter relates to the taxability, under our income tax article, of dividends declared by National Securities Series, an "unincorporated investment company of the open-end diversified type organized under a Trust Agreement with Empire Trust Company, Trustee." It qualifies as a regulated investment company under Section 361(a) (3) of the Internal Revenue Code.

The dividend in question is one paid from capital gains, and it has been either (1) paid in cash direct to the shareholder or (2) retained in the fund but constructively distributed for Federal tax purposes by paying

the dividend in cash to Empire Trust Company as agent for the shareholder and immediately reinvested by the Trustee for the benefit of the shareholder. Your inquirer analogizes this with a stock dividend on the theory that the shareholders' respective interests in the fund remain unchanged; and he suggests (1) that such dividend is not taxable, and (2) that, if taxable, it is taxable only as a capital gain.

In my opinion this so-called dividend is not a "dividend" in the sense in which that word is used in our Revenue Act, for the reason that the source of this dividend is not a corporation, but an "unincorporated company." The "dividend," therefore, seems to be no more than a portion of a capital gain derived by many people acting jointly; or by one person investing in a trust. This being true, it is difficult to see how the taxability of the gain could be affected by an agreement to reinvest the gain. Even if this were a corporate dividend, I would still be of the opinion that it is not a stock dividend under these circumstances, because of the express terms of the agreement.

Therefore, it is my opinion that the so-called dividend is taxable as any other investment gain. It is not material whether it is a long-term or a short-term capital gain, for our Revenue Act taxes capital gains as any other income and does not offer the special benefits found in the Federal statute.

INCOME TAXATION; DEDUCTIONS; PENSION TRUSTS; CONTRIBUTIONS FOR
PAST SERVICE COST, AMORTIZED

21 February 1947

You have submitted to me a protest, filed by Hanes Hosiery Mills Company, Winston-Salem, N. C., taxpayer, against your proposed assessments based upon the disallowance of certain pension trust contributions as deductions; and you request my opinion upon the matter. The taxpayer is represented by Messrs. Womble, Carlyle, Martin, and Sandridge, attorneys at law, Winston-Salem, N. C.

It appears that for the taxable years 1943, 1944 and 1945 the taxpayer made certain contributions to its pension trust covering, in each of said years, one-tenth of the amortized cost of past service under the pension plan. These contributions were made for the purpose of covering the unpaid cost of the benefits of the pension plan which were based on the past service of employees. It is for this reason that they are referred to as contributions for "past service cost." Thus, the taxpayer observes that such contributions are not contributions made in or allocable to the past ten years over which they are amortized, but are contributions made in, and allocable to, the present taxable year (*i.e.*, the taxable year in which paid) for the purpose of taking care of the additional cost which arises from the computation of benefits based on employee service extending back of the date on which the pension plan became effective. On this theory the taxpayer claims that such contributions are deductible under Section 322 (13) of the Revenue Act (G. S. 105-147) in the taxable year in which made.

In addition, the taxpayer claims a deduction for interest on such contributions for the taxable year 1943; and a deduction for similar interest in 1944, plus trustee's fees and expenses; and a deduction of trustee's fees and expenses in 1945; and a deduction for a contribution to the Winston-Salem Police Pension Trust Fund in 1945.

I am of the opinion that the deduction of contributions for past service cost, amortized over the past ten years, should not be disallowed merely because the purpose of such contributions was to cover past service cost. It appears to me that the past service of employees is used simply as a basis for determining the amount of future benefits under the pension plan and that these additional contributions are made for the purpose of taking care of these increased future benefits. I see nothing in the nature of such contributions to indicate any retroactive operation of the plan other than a recognition of the length of service of the employee in computing benefits to which he is entitled after the plan becomes effective.

Before allowing the deduction, you should determine whether or not the amounts contributed are "reasonable." This entails a consideration of the question whether or not ten years is a reasonable period over which to amortize the past service cost.

However, some of these contributions were made in 1943. This was prior to the effective date of our statute, January 1, 1944, and should be disallowed, together with the interest which is claimed.

As to the trustee's fees and expenses, it would seem that these would be deductible as contributions to the pension trust if reasonable in amount. I do not think they would be deductible as ordinary and necessary expenses of the taxpayer in this state.

I am not advertent to any provision of law under which the taxpayer could deduct the contribution to the Police Pension Trust Fund.

By way of summary, it seems to me that for 1944 and subsequent taxable years the taxpayer may deduct reasonable amounts as contributions to its pension trust to cover past service cost, and to cover interest on such contributions, and to cover trustee's fees and commissions; and that you should disallow all such contributions for 1943 and also the contribution in 1945 to the police trust fund.

This opinion subsumes that the taxpayer's pension trust is one which qualifies generally under Section 322 (13) of the Revenue Act. I do not have sufficient information before me to enable me to pass upon that question.

INCOME TAXATION; SEC. 322; DEDUCTIONS; AMOUNTS EXPENDED FOR
MEDICAL CARE; FEES PAID TO AN AUTHORIZED CHRISTIAN
SCIENCE PRACTITIONER

15 March 1947

Mr. William C. Blackburn of the Christian Science Committee on Publications for North Carolina has requested advice upon the question whether or not fees paid to an authorized Christian Science practitioner are amounts expended for "medical care" within the meaning of subsection 7½ of Section 322 of the Revenue Act.

In my opinion such fees do constitute amounts expended for medical care within the meaning of that section; and, therefore, are deductible from gross income within the limitations therein provided. Your attention is directed to the fact that the Commissioner of Revenue has ruled that authorized Christian Science practitioners are subject to the privilege tax levied by Section 109 of the Revenue Act upon "any person practicing any professional art of healing for a fee or reward."

This opinion follows the ruling of the Federal Treasury Department with respect to a similar deduction in the Internal Revenue Code.

INHERITANCE TAXATION; TIME OF VALUATION OF ESTATE

18 March 1947

You have requested my opinion as to when the estate of a decedent should be valued for inheritance tax purposes.

In my opinion the estate of a decedent must be valued for the purposes of inheritance taxation at the time of the death of the decedent. *STATE v. BRIDGERS*, 161 N. C. 247, 256. While this case is an interpretation of the inheritance tax sections appearing in the Revenue Acts of 1907 and 1911, I feel that it is controlling since there have been no material changes in the general inheritance tax statutes since that time. The conclusion herein reached is buttressed by the language of G. S. 105-16, which provides that inheritance taxes are due and payable at the death of the decedent.

G. S. 105-29, relating to uniform valuation of estates for North Carolina inheritance taxes and Federal estate taxes, does not militate against the position herein asserted. That statute provides specifically that we are not required to accept the Federal valuation. As a further indication that we are not required to accept the Federal valuation your attention is directed to Section 822(a) of the Internal Revenue Code, which provides that the Federal estate tax shall be due and payable fifteen months after the decedent's death.

This is the interpretation placed upon the North Carolina inheritance tax statutes by the Department of Revenue and the Attorney General's office over a long period of time.

LICENSE TAXATION; EMIGRANT AGENTS, SECTION 154

21 March 1947

You have requested me to advise you of my opinion whether or not Section 154 of the Revenue Act (G. S. 105-90) imposes a privilege tax upon a person who solicits, hires or contracts with persons in this State for employment out of the State where such employment consists of supervising the installation of industrial machinery, training and supervising operators of said machinery, superintending industrial operations and serving as cost engineers, and in other supervisory capacities in connection with industrial operations, but where such employment does not embrace any manual labor except such incidental and occasional manual activity as may be necessary in the performance of the duties of the positions listed above.

The answer to your question depends upon the interpretation to be placed on the word "laborers" in subsection (a) of Section 154 (G. S. 105-90), which levies a privilege tax upon every person who is engaged in "soliciting, hiring and/or contracting with laborers . . . in this State for employment out of the State."

The word "laborer" has an extremely broad meaning, and may include one who performs all kinds of labor, physical and mental. However, the popular meaning is more restricted and usually is confined to a person who performs manual or physical labor or who labors with his hands for wages. *35 C. J. 926, Laborer*, Sec. 1 et seq. A laborer has been defined as a person without particular training, employed at manual labor under a contract terminable at will. *Black's Law Dictionary, Third Edition*, p. 1062. A laborer is defined in *Webster's New International Dictionary, Second Edition*, as "one who does physical labor; one who works at a toilsome occupation; esp., a person who does work that requires strength rather than skill, as distinguished from *artisans* and from the *professional* classes." In connection with a statute which gave debts for "labor performed" priority over mortgages, our court has held that a superintendent of a mill who did not perform any manual labor was not a "laborer," on the basis of definitions similar to the above. *Moore v. Industrial Company*, 138 N. C. 304, and cases cited therein. See also *Whitaker v. Smith*, 81 N. C. 340; *Alexander v. Farrow*, 151 N. C. 320; *Stephens v. Hicks*, 156 N. C. 239; *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N. C. 512.

Although the word "laborer" under some circumstances may have a general meaning which would embrace every person who labors, physically or mentally, in my opinion this word, as used in subsection (a) of Section 154, must be deemed to have been used in its popularly accepted meaning to include only those persons who do manual labor. I believe that the general purpose of the statute supports this view.

Accordingly, I am of the opinion that the tax levied by this section does not apply to a person who solicits, for employment out of the State, other persons only for the performance of supervising and superintending functions in industrial operations as set out above, if the only manual labor included in those functions is such incidental and occasional manual activity as may be necessary to the proper performance of said functions.

INCOME TAXATION; DEDUCTIONS; CONTRIBUTIONS TO ASSOCIATION FOR WELFARE OF EMPLOYEES

24 March 1947

You have requested me to advise you of my opinion with respect to the question whether or not Cramerton Mills, Inc., may deduct, within the limitations allowed by the statute, contributions which it makes during the taxable year to trustees for Bennett-Hall Association. This association is a trust established for non-profit purposes for the promotion of the welfare of the employees of the taxpayer, Cramerton Mills, Inc. The trustees consist of the president and three other directors of the taxpayer corporation, two voting stockholders of the taxpayer corporation who are not directors, two employees of the corporation who are not voting stockholders therein, and one minister of the gospel connected with a church

at Cramerton, N. C. The trustees are elected annually by the taxpayer corporation's board of directors. The indenture by which the trust is established states that the association shall be operated "for the benefit of employees of the grantor or their families or dependents in case of illness, death or other emergency, or for the relief or alleviation of suffering or distress among them, or for any charitable or other purpose which in the judgment of the trustees will tend to improve the general welfare and living conditions of the employees of the grantor, their families or dependents."

In my opinion contributions to the Bennett-Hall Association under the above circumstances will be deductible, to the extent provided in Section 322, as charitable contributions. I do not think that restriction of the benefits to the donor's employees and their families, where the donor is a large corporation employing an indefinite number of people, would vitiate the charitable nature of the contribution. This trust has purposes which have been traditionally regarded as charitable and, in my opinion, should be recognized as charitable. See *Gimbel v. Commissioner*, (CCA, 3rd) 54 Fed. (2d) 780, 10 AFTR 996.

It should be understood that this opinion does not go to the extent of saying that such payments are deductible as a business expense.

INHERITANCE TAXATION; TRUST FOR BENEFICIARIES OF SEVERAL CLASSES:
VALUATION OF SHARES WHERE AMOUNTS TO BE RECEIVED BY LATER
BENEFICIARIES DEPEND ON EXERCISE OF TRUSTEE'S DISCRETION
AS TO EARLIER BENEFICIARIES

27 March 1947

You have referred to me a copy of the will of Raymond S. Farr and a copy of the revocable trust agreement executed by Mr. Farr before his death, and have requested me to advise you of my opinion upon the same with respect to inheritance taxation. If I understand the reason for your request and the particular phase of this matter which occasions your request, it appears to me that the pertinent facts are as follows:

On August 14, 1945, Raymond S. Farr, a resident of Pinehurst, N. C., executed a revocable trust agreement, transferring certain personal property to trustees for the benefit of his wife for life, then his sister for life, then his niece for life, then his wife's niece for life. Full discretionary powers were placed in the trustees, with expressions indicating a desire that his wife have from the trustees as much as she should want of the trust estate. The trust was to terminate when all the living children of the wife's niece should reach thirty years of age; or twenty years after the death of the survivor of the donor and the wife's niece. In default of issue of the wife's niece, the trust was to continue for the benefit of the issue of the wife's nephew. At termination of the trust the property was to be distributed to the issue of the wife's niece, if any, and, if none, to the issue of the wife's nephew. On a failure of beneficiaries the trust property was to go to two churches, one in Massachusetts, the other in Pinehurst, N. C. The other provisions of the trust instrument do not seem to be relevant to the questions involved.

On the same day that he executed the aforesaid trust agreement, Raymond S. Farr executed his last will and testament, in which he left his residuary estate to trustees upon a trust similar to the one established in the trust agreement, with provision that the testamentary trustees in their discretion could transfer all the residuary estate to the previous trust, or hold it upon conditions fully set out in the will. The terms of the trust and the beneficiaries appear to be essentially the same in the trust agreement and in the will.

Subsequently, within three years from the date of the execution of the trust agreement and the will, Raymond S. Farr died, leaving his wife and the other named beneficiaries surviving him.

Since the testator died within three years from the execution of the trust agreement, it is my opinion that the transfer must be deemed to have been made in contemplation of death within the meaning of Section 1, subsection Third, of the Revenue Act, (G. S. 105-2). Inasmuch as the terms and conditions of both the trust agreement and the testamentary residuary trust appear to be essentially the same and so closely related to each other as to suggest a single trust, it seems to me that, for purposes of inheritance taxation, the two trusts may be treated as one trust, with all the property of both trusts passing under the will.

The actual computation of the tax appears to me to be a more difficult matter because of the fact that the trust is limited in succession to several life tenants and then to ultimate remaindermen whose identity depends upon contingencies. At this time it is not possible to say with certainty who will take, much less what the value of his or her share will be. The only certain beneficiary at this time is the first taker, the wife, who survived the testator and, therefore, takes a life interest. The other life beneficiaries could possibly predecease the wife, which would cause their life interests to fall in. The ultimate remaindermen cannot be ascertained, for their identity depends on who survives—and on the birth of issue.

If all possible beneficiaries belonged to the same class, there would be no necessity of valuing the share of each beneficiary, for in that case the entire estate could be taxed at one set of rates without regard to the various shares; and the tax would be payable out of the *corpus* of the estate without adjustment among the shares. *Wachovia Bank & Trust Co. v. Lambeth*, 213 N. C. 576.

However, the beneficiaries here belong to all three classes. The wife is in Class A. The sister and niece are in Class B. The wife's niece and nephew and their issue are in Class C. And the churches are in an exempt class. (At least the North Carolina church is exempted; as to the Massachusetts church, see Section 2, subsection c, of the Revenue Act, G. S. 105-3.) The fact that the beneficiaries, both those having vested interests and those having contingent interests, belong to different classes, calling for different tax rates, makes it necessary to determine the values of the various shares, unless some other method can be found to compute the tax upon the whole estate.

Section 17 of the Revenue Act (G. S. 105-19) provides, *inter alia*, as follows:

"When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Revenue Commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the Commissioner of Revenue shall assess the tax on such property."

In my opinion the instant case is one which falls within the purview of the aforesaid provision and, therefore, is one which evokes the exercise of discretion. The computation of the value of a share of inheritance is an uncertain thing at best; and where the matter is complicated by a succession of life estates and other contingencies, immediate and remote, such computation may well be reduced to a process of mere conjecture.

Under all the circumstances it seems to me that this is a case in which you must apply a rule of reason in determining the various fractional parts of the entire estate which shall be allocated to Classes A, B and C for purposes of applying rates of tax. It seems unnecessary to attribute a specific value to each beneficial interest in the estate. It seems sufficient simply to divide the estate into parts which will fall in the respective beneficiary classes, or in exempt classes, and then compute the tax on the value of each part at the applicable rates for the class in which it falls. The entire tax would then be payable out of the *corpus*, without any adjustment among the beneficiaries as to tax attributable to each share. *Wachovia Bank & Trust Co. v. Lambeth, supra*.

Applying these principles specifically, it will be observed that the only Class A beneficiary is the testator's wife, who is the first taker and has a rather extensive right to encroach upon the principal of the trust, even to the extent of reducing the estate to nothing, dependent upon the discretion of the trustees. The extensive right of the wife, her customary manner of living, other factors evidencing the probable amounts to be needed by her, her age and life expectancy, the size of the estate, and other pertinent facts and factors should be considered by you in determining the value of the wife's part of the inheritance. Since the wife is the only Class A beneficiary, the value of her share would be the part of the estate to be computed at Class A rates.

Whatever value is attributed to the wife's share must be deducted from the value of the entire estate. The balance thereby obtained must then be divided among the remaining classes. The next taker after the wife is the sister, a Class B beneficiary, and the next after that is the niece, another Class B beneficiary. Then, in succession come the wife's niece, Class C, the issues of the wife's niece, Class C, the issues of the wife's nephew, Class C, and charitable institutions, exempted. It appears to me that here, as in the case of the wife's share, you must take into consideration the various factors which are pertinent to the value of each interest.

It is obviously impossible to lay down any fixed rule by which the values of the various shares may be determined. As I have stated, I deem it unnecessary to attribute a definite value to each share. It seems more proper to approach the problem generally by assigning various parts of the estate to the different rate classes. It should be observed, however, that the interest of each successive beneficiary becomes more remote and contingent than the preceding one, and that it is unlikely that any large part of the estate, if any part at all, will ever reach the latter beneficiaries. Of course, whether or not the latter beneficiaries will eventually receive anything depends, in large measure, upon the value of the estate; thus, if the estate is one of moderate size, it may well be that, under these liberal testamentary provisions, the entire estate will be exhausted by the wife, leaving nothing for the succeeding beneficiaries.

However, the matter is one for your administrative discretion, and I think the statute grants you rather broad discretionary power in a case of this kind. It seems appropriate for you, in the exercise of your discretion, having due regard for all relevant circumstances and the terms of the will, to compute the tax upon the estate by dividing the estate into such rate classes as may be reasonable. In view of the many factors involved and the contingent character of the interests, it seems to me improper to attempt any allocation of a definite value to each share based merely upon use of the mortuary and annuity tables. I do not intend to imply that these tables are not relevant to the inquiry; they are both relevant and important and should be used. I state merely that, in my opinion, the matter should not be resolved by a consideration of that factor alone. Certainly the ages of the beneficiaries are an important consideration, for it is conceivable in a given case that the youth of the first taker might render practically worthless the interest of subsequent beneficiaries.

I realize that this may not be a satisfactory answer to your question. The reason, I think, is that the matter is one for administrative, rather than legal, determination. However, I shall be happy to discuss the matter with you further if you so desire.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME; RIGHT TO REFUND
NOT FORFEITED IF NOTICE GIVEN WITHIN TWO YEARS, EVEN THOUGH
TAXPAYER PRIOR TO STATUTORY AMENDMENT FAILED TO COMPLY
WITH THIRTY-DAY NOTICE REQUIREMENT

27 March 1947

You have requested me to advise you of my opinion on the question whether or not a taxpayer who, prior to the recent amendment of Section 334, changing the thirty-day notice to a two-year notice, failed to give you notice of federal correction of income within thirty days as required by said statute, has thereby forfeited irrevocably his right to a refund on account of correction of income originally reportable more than three years past.

Until the enactment of recent amendments Section 334 of the Revenue Act (G. S. 105-159) provided, *inter alia*, that a taxpayer must give the Commissioner of Revenue notice of any federal change or correction of net

income within thirty days of the agent's report, and that failure to comply with this requirement would work a forfeiture by the taxpayer of any right to a refund by reason of such change or correction:

"Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the Federal Government within the time specified . . . shall forfeit his rights to any refund due by reason of such change."

The General Assembly has just enacted the Revenue Bill of 1947. Among other things this bill amends Section 334 by changing the thirty days to two years. The effective date of this amendment is January 1, 1947.

It is my opinion that it was the purpose of the General Assembly to extend the relief granted by this change to all taxpayers who give the required notice within two years after the federal agent's report, including those taxpayers who have previously failed to give the notice within the thirty-day period provided by the former statute. This interpretation achieves a fair result and avoids a discrimination which, in my opinion, was not intended. Even though more than thirty days may have elapsed before the effective date of the amendment (January 1, 1947), it appears to me that it was the purpose of the amendment to permit a refund if the notice is given thereafter, but within two years of the federal agent's report, and that, if notice is given within such two-year period, the taxpayer has not failed "to comply with this section as to making report of such change as made by the federal government within the time specified."

In my opinion the principle which prevents the revival of barred causes of action is not applicable here. That principle is founded upon the due process clauses of the State and Federal Constitutions and applies to revival of barred rights as against an individual. It does not affect a State's right to enlarge an individual's rights as against the State.

INCOME TAXATION; INCOME OF NON-RESIDENT FROM FEDERAL EMPLOYMENT IN STATE

3 April 1947

You have referred to me your file in the case of Ray H. Holley, taxpayer, and have requested me to advise you of my opinion upon the taxability of income received by the taxpayer from his employment by the federal government in Asheville, N. C. The taxpayer is represented by Messrs. Harkins, Van Winkle and Walton, Attorneys at Law, Asheville, N. C.

It appears that the taxpayer is employed in Asheville, N. C., by the General Accounting Office of the United States Government. This Office has its headquarters in Washington, D. C., and all its offices were located in Washington until 1943, when the exigencies of the war compelled the removal of a part of the offices, together with an adequate staff of employees, to Asheville. It is anticipated that such offices will be returned to Washington whenever conditions shall render such action feasible. It is asserted that the offices in Asheville are a part of the General Office in Washington, and not merely a branch or field office.

Because of the view which I take of this matter, I deem it unnecessary to decide whether or not the taxpayer is a resident of this State. Although it may well be doubted that the taxpayer has overcome the presumption of domicile arising from his long continued residence in this State (G. S. 105-132, subsection 13), for present purposes I shall pass that question and assume that the taxpayer is a non-resident.

Thus, we have a situation in which a non-resident earns wages or salary from employment by the federal government in this State. In my opinion, such a non-resident receives income from a "business, trade or occupation carried on in this State" and is taxable upon the same under the provisions of G. S. 105-133. In my opinion this conclusion is not affected by the fact that the taxpayer is actually paid from sources outside the State, or by the fact that the office in which the taxpayer was employed was part and parcel of the General Office in Washington, D. C. The taxpayer was carrying on within this State the occupation of providing his personal services for compensation, and this is true even though he was paid from Washington. This occupation was carried on within the territorial limits of North Carolina, for it does not appear that the federal government had acquired title or exclusive jurisdiction over the property or territory on which the taxpayer was employed. The right of the taxpayer to pursue his occupation within the territorial limits of this State was afforded the protection of the laws of this State. In my opinion this matter is controlled by *Atkinson v. Oregon*, 303 U. S. 20, 82 L. ed. 621, where the Supreme Court of the United States upheld Oregon's right to impose its income tax upon a non-resident's income from work done under a contract with the federal government as to construction of Bonneville Dam over the Columbia River.

In the instant case I am unable to see how the matter can be affected one way or the other by any attempt to characterize the Asheville office as a part of the Washington Office as distinguished from a field office, except as this distinction may bear upon the question of domicile, a question not considered at this time.

In my opinion the two cases cited by the taxpayer are not determinative of the question discussed here. *District of Columbia v. Murphy*, 314 U. S. 441, 86 L. ed. 329, was a case involving taxability on the basis of domicile in the District of Columbia, a community having peculiar characteristics of its own. *International Harvester Co. v. Wisconsin*, 322 U. S. 435, 88 L. ed. 1373, was a case upholding Wisconsin's right to impose a tax upon a corporation's relinquishment or payment of dividends earned within the State.

For the reasons stated herein I am of the opinion that the salary of the taxpayer, earned in this State from employment by the federal government in an office of a federal department located in this State, constitutes taxable income in this State even though the taxpayer may be a non-resident of this State, and even though such salary may be paid from the office in Washington, D. C.

The views expressed herein are inconsistent with those heretofore expressed by me orally, and are the result of a more mature consideration of the matter.

SALES AND USE TAXATION; MOTOR VEHICLES; CHASSIS AND BODY
TO BE PLACED THEREON

9 April 1947

I have your letter of March 3, 1947, in which you ask my opinion on the following facts: Subsection (c) of Section 405 of the Revenue Act exempts from the use tax on motor vehicles a body which is purchased separately from the chassis of a motor vehicle and is thereafter installed on said motor vehicle. From time to time petroleum companies have purchased tanks which are placed on automobile chassis and other tanks which are partly towed and partly placed on automobile chassis. These companies have asked you if the above types of tanks fall within the tax exemption granted by subsection (c) of Section 405.

The answer to your inquiry involves an interpretation of the following sentence of subsection (c), Section 405, of the Revenue Act:

"It is declared to have been the purpose of this subsection that whenever a motor vehicle chassis is or has been purchased separately from the body which is thereafter installed thereon, the maximum tax herein levied shall be imposed only on the sale of the chassis and no additional tax shall be imposed upon the body mounted upon the same."

To be exempted under the above-quoted sentence the tank must constitute the body of the vehicle and must be installed on the vehicle. The purpose of the exemption is to make the tax burden equal on all persons buying motor vehicles, and the provision is necessary unless the purchaser of a chassis and body separately is to be discriminated against. This is true because the body of a motor vehicle is a part of the vehicle itself. See *Kansas City Automobile School Co. v. Holcker-Elberg Co.*, (Mo. 1916). 182 S. W. 759, 761.

The chassis of an automobile is the under part consisting of the frame with the wheels and machinery. *Kansas City Automobile School Co. v. Holcker-Elberg Co.*, *supra*. The body of an automobile is the "bed or box on or in which the load is placed; the enclosed or partly enclosed part of an automobile back of the hood." *Webster's New International Dictionary*.

When a tank is placed upon the chassis of a truck and is securely fixed thereto, it becomes, in my opinion, the "body" of that truck as that term is used in the sentence quoted above from Section 405. When, however, a part of the weight of the tank is carried upon the motor vehicle and a part on wheels attached to the tank, the tank, in my opinion, is not a "body" as that term is used in the above-quoted sentence of Section 405. The tank in this case is a trailer, a separate vehicle from the chassis or motor vehicle which is used to pull it. A trailer is defined in *Webster's New International Dictionary* as "a vehicle or one in a succession of vehicles hauled, usually, by some other vehicle . . . a non-automotive, highway vehicle designed to be hauled, as by a tractor, a motor truck, or a passenger automobile." The tank which is partly carried and partly pulled by a motor vehicle seems to fall squarely within this definition of trailer, and, as such, is not a body within the statutory provision under consideration.

INCOME TAXATION; CORPORATE BUSINESS EXPENSES; CONTRIBUTIONS TO
TRUST FOR WELFARE OF CORPORATE EMPLOYEES

14 April 1947

Under date of November 1, 1946, this office rendered an opinion in the case of Virginia Mills, Inc., to the effect that contributions made by said corporation to "The Baker Foundation," a trust for the benefit of employees, were not deductible as ordinary and necessary expenses. The facts are set forth in the second paragraph of that opinion as follows:

"The taxpayer contends that you should allow as ordinary and necessary business expenses contributions made by it to "The Baker Foundation," created under a trust indenture dated November 30, 1943, and executed by the President of the taxpayer. It appears that the Baker Foundation is controlled entirely by its trustees and not by the taxpayer; that the trust indenture under which it was created is irrevocable; that neither its principal nor its income can ever revert to the taxpayer; that its purposes are to make the taxpayer's employees more comfortable by providing for them recreational facilities and by generally doing such things as will make them more contented and, therefore, better workers; that toward this end playgrounds and a swimming lake have been acquired for the use of the employees, a recreational director has been employed to assist employees in obtaining the greatest benefit from the facilities provided, a building for indoor games and other recreation has been provided, and the operation of a moving picture theater has been commenced. It is contemplated that the activities of the Foundation may, in time, include direct assistance to less fortunate employees and their families."

After the aforesaid opinion was rendered the taxpayer requested a further hearing, which was granted. The arguments made at that hearing, together with independent research in this office subsequent to that time, have persuaded me that the opinion previously rendered was not correct. Therefore, it seems appropriate to state my further views upon the matter.

Until a few years ago, contributions as such were deductible under Federal and State statutes only by individuals. In order to be deducted by a corporation a contribution had to be justified as an ordinary and necessary business expense, and it was upon this theory alone that contributions and gifts by corporations were allowed as deductions.

The denial to corporations of the right to deduct contributions and gifts as such possibly has resulted in a more liberal interpretation of the business deduction than otherwise would have been given by the courts, because of the feeling that contributions under some circumstances were desirable and to be encouraged. Be that as it may, the Federal courts have followed a fairly consistent pattern in allowing as a corporate business expense any contribution for the welfare of corporate employees reasonably calculated to benefit the corporation. Expenditures for employee welfare work has been justified on the ground that it helps the morale of employees, increases their productivity, reduces labor turnover, eliminates industrial strife, and generally provides the corporation all the benefits to be derived from a contented and satisfied group of employees.

In this way a "direct" relationship has been found to exist between the expenditure and the corporate business. The benefits flowing from the contribution are said to be "direct" to the corporation.

Corning Glass Works v. Lucas, 37 F. (2d) 798, 8 AFTR 10053, Cert. denied 281 U. S. 742 (\$25,000 contribution by glass manufacturing corporation to building fund of hospital, where corporation's employees made up two-thirds of population of the city, *held*, deductible as business expense); *Superior Pocahontas Coal Co. v. Commissioner*, 7 BTA 380 (\$1,000 contribution made by coal mining corporation toward rebuilding church where ninety per cent of town's wage earners and seventy-five per cent to ninety per cent of congregation were employed by corporation, *held*, deductible as business expense); *American Rolling Mill Co. v. Commissioner*, (CCA 6th) 41 F. (2d) 314 (Contributions to a civic improvement fund by a corporation employing half the wage earning population of the city, where made, not for charity, but to add to skill and productivity of employees, *held*, deductible as business expense); *Ritter Lumber Co.*, 30 BTA 231, 271 (Expenditures by corporation for welfare work among employees at mill and camp sites, resulting in benefit to business by improving morale and well-being of employees, *held*, deductible as business expenses); *Missouri Pacific Railroad Co.*, 22 BTA 267, 289 (Payment by railroad corporation to Y.M.C.A. units along railroad line to furnish its employees with eating and rooming facilities and social and recreational activities, *held*, deductible as business expenses); *Elm City Cotton Mills*, 5 BTA 309 (Contribution by corporation to another corporation organized and operated exclusively for promotion of social welfare work among employees and for advancement of physical, mental and moral interests of employees, *held*, deductible as business expense); *Poinsett Mills*, 1 BTA 6 (Contribution by corporation to church in its mill village, inhabited solely by its employees, *held*, deductible as business expense); *Holt Granite Mills Co.*, 1 BTA 1246 (Contribution by corporation to graded school district to assist in erection of building for use of school, where ninety per cent of children attending were children of employees, *held*, deductible as business expense); *Cf. Commissioner v. Lazarus & Co.*, 101 F. (2d) 728 (Contributions to Community Fund, Salvation Army, Hospital disallowed as business deductions where benefits flowing to corporation's employees were incidental, insubstantial and indirect benefits flowing mostly to public); See *P-H Fed. Tax Service*, 1947, Par. 12,806 *et seq*; 30 Columbia L. Rev. 1211.

In my opinion there is no essential difference between the Federal statute and our own with respect to what constitutes an ordinary and necessary business expense, unless some difference as to particular items be found in a peculiar legislative or administrative history which, as far as I know, is not a factor in the instant case. It appears to me, therefore, that you will be justified in following the Federal cases upon the question at hand. Therefore, it is my opinion that you should allow as deductible business expenses in this case any reasonable amounts contributed during the taxable year by the taxpayer corporation to The Baker Foundation.

But you should be satisfied that the contributions are reasonable in amount and are reasonably related to the business of the current year. A contribution in the nature of a capital expenditure is not deductible as a business expense. An expenditure by a corporation for the erection of a substantial brick building for the use of its employees as a club house is

a capital expenditure and is not deductible as an ordinary and necessary expense. *Athenia Steel Co.*, 1 BTA 559. If the expenditure is calculated to result in economic benefit to the corporation for years to come, it is not deductible as a business expense even though, because of the nature of the expenditure there is no way to capitalize it. *Kauai Terminal Ltd.*, 36 BTA 893. In my opinion the same would be true in the case of a contribution to a trust or other organization which then makes the necessary expenditure for legitimate business purposes. The annual contribution, to be deductible as a business expense, should bear a close relationship to the annual needs and expenditures (other than capital expenditures) of the trust. The trust may not be used as a device to obtain a complete deduction within the taxable year for a capital expenditure, or for any other expenditure calculated to generate benefits to the corporation over a span of years. For example, if the corporation in the instant case were to contribute to the Foundation a sum of money for the building of a swimming pool, such contribution could not be an ordinary and necessary expense (even if spent directly by the corporation for that purpose); and it cannot be deducted as a capital expenditure, for there is nothing in the contribution that the corporation may capitalize.

With the limitations suggested, I am of the opinion that contributions by the taxpayer corporation to The Baker Foundation are deductible as ordinary and necessary business expenses.

SALES AND USE TAXATION; ELECTRICAL EQUIPMENT; COST-PLUS-A-FIXED-FEE CONTRACT WITH MANUFACTURING PLANT;
MILL MACHINERY

21 April 1947

You have referred to me a letter from Thompson Electrical Company, and have requested my opinion concerning the liability of the Thompson Electrical Company for sales tax on certain equipment purchased for use in the performance of a contract with the American Tobacco Company.

Thompson Electrical Company has entered into a cost-plus-a-fixed-fee contract with the American Tobacco Company for the installation of certain electrical equipment. The contract provides that the Thompson Electrical Company is to purchase the required items to be used in the performance of the contract, and the American Tobacco Company is to reimburse Thompson Electrical Company at the end of each month for the amounts expended in the acquisition of such equipment. The American Tobacco Company contends that the 3% sales tax is not due on this equipment because it is to be used in connection with the manufacture of cigarettes, and thus should be classified as mill machinery.

I am of the opinion that Thompson Electrical Company was the purchaser of all of this equipment. I have no facts before me which would indicate that Thompson Electrical Company had any authority to bind the American Tobacco Company in any purchase for materials. No facts have been presented which disclose that title passed directly from the seller to the American Tobacco Company. Thus, I am of the opinion that the sales were made to Thompson Electrical Company, and that such sales were subject to the 3% sales tax. Cf. *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3; Cf. *Curry v. U. S.*, 314 U. S. 14, 86 L. ed. 9.

I am also of the opinion that subsection (m) of Section 406, which imposes the wholesale rate of taxation on sales of mill machinery, has no application to the facts of the instant case. That subsection applies only when sales of mill machinery or accessories are made to manufacturing industries and plants. As outlined above, I am of the opinion that the sale of the equipment was to Thompson Electrical Company, who is not a manufacturer, and not to the American Tobacco Company.

INCOME TAXATION; FEDERAL CORRECTION OF INCOME; SECTION 334
INAPPLICABLE WHERE TAXPAYER FILED NO ORIGINAL
FEDERAL RETURN

6 May 1947

I have your letter of May 5, 1947, requesting my opinion with respect to your right to make an assessment against Mr. Raymond C. Foster, Harmony, N. C., under the following facts:

It appears that the taxpayer filed neither State nor Federal income tax returns for the years 1938, 1939 or 1940. You indicate that there is no evidence of fraud. Therefore, it would seem that your right to make an assessment on the basis of the taxpayer's duty to file the original return has been barred by the five-year statute of limitations for each of the years in question. Section 335 of the Revenue Act provides that "upon failure to file returns and in the absence of fraud the limitation shall be five years."

However, the Federal Government charged the taxpayer with fraud, and ultimately compromised the case with the taxpayer, as a result of which the taxpayer has paid income tax to the Federal Government for the years in question. Therefore, the question arises whether or not you have the right under the provisions of Section 334 of the Revenue Act to make an assessment against the taxpayer for the years in question based upon the assessments made by the Federal Government.

Section 334 of the Revenue Act is applicable "if the amount of the net income for any year of any taxpayer under this article, *as returned* to the United States Treasury Department, is *changed* and *corrected* by the Commissioner of Internal Revenue or other officer of the United States of competent authority." (Italics ours).

I am of the opinion that Section 334 contemplates only that case in which a Federal return of income is made and in which such return is changed and corrected. In my opinion the language of this statute is not sufficiently broad to embrace a case in which the taxpayer filed no return at all with the Federal Government. It appears to me that our right to assess this taxpayer depends on considerations other than the assessment by the Federal Government, and that our right, if any exists, is independent of the Federal action.

In view of your statement that there is no indication of fraud on the part of the taxpayer, I am of the opinion that your right to make an assessment upon the basis of the taxpayer's duty to file the original return is now barred by the five-year statute of limitations; and that you have no new right to make an assessment arising from the Federal assessment.

GASOLINE TAXATION; DELINQUENT TAX ACCOUNT OF THE
ASHFORD OIL COMPANY

6 May 1947

I have your letter of April 17, 1947, in regard to the delinquent tax account of the Ashford Oil Company.

It appears that the Ashford Oil Company was licensed as a motor fuel distributor on March 31, 1927, and filed a \$10,000 bond with U. S. F. & G. Company, as surety. On September 18, 1932, the license was cancelled because the bonding company withdrew from the bond. On November 18, 1931, you obtained a judgment in the sum of \$16,181.82 for delinquent tax. No execution was issued against the taxpayer. The taxpayer was allowed to continue business until the date of the cancellation of its license, at which time an additional tax liability of \$7,624.13 had accrued, making a total delinquent tax of \$23,805.95.

After cancellation of bond the taxpayer continued to operate on a tax paid basis, and was credited \$2,253.16 to his delinquent account. On July 31, 1945, the Commissioner of Revenue, with the approval of the Attorney General, accepted \$5,000.00 from the bonding company in full settlement of all rights against the bonding company.

At the time license was issued, taxpayer had certain properties in and around New Bern reported to be worth \$100,000.00. On March 27, 1930, taxpayer executed a mortgage to the Citizens Bank & Trust Company of New Bern on practically all of its real estate. The bank was later liquidated, and the mortgage was foreclosed. The purchaser at the mortgage sale was Dr. Ashford, the son of T. P. Ashford who was the principal owner of the stock in Ashford Oil Company, the taxpayer.

There still remains a balance due of \$16,552.79. You state that it does not appear that there are any assets of the taxpayer on which you could issue execution. You desire me to advise you of my opinion with respect to the possibility of making any further collections by court action or otherwise, and with respect to the advisability of charging off the account as being uncollectible.

Ultimately, the question whether or not you should charge off this item as uncollectible is a matter calling for the exercise of administrative policy and discretion, and I would not be willing to advise upon that ultimate question. It appears to me that the only function of this office is to take the facts as you present them and advise on questions of law arising therefrom.

You have concluded that the taxpayer company has no property out of which you could collect the tax, and I shall accept that conclusion as a fact. However, you suggest in your letter that it may be possible to subject to the tax that property which formerly belonged to the taxpayer and is now owned by the son of the taxpayer's principal stockholder, said son having purchased the same at mortgage foreclosure sale.

There is, of course, the theoretical possibility that the purchase by the son of the taxpayer company's principal stockholder was made with funds of the taxpayer, and that the present owner holds the property subject to a parol trust for the benefit of the taxpayer. However, you have presented no facts which lend any weight to this suggestion. I do not think that the relationship between the present owner and the company's prin-

cial stockholder would be sufficient, standing alone, to generate any presumption of fraud or of a parol trust. Unless you are able to develop further evidence, I am of the opinion that you have no case against the present owner, and cannot subject the property to the tax, for it appears that the docketing of your tax judgment occurred after the registration of the mortgage under which the present owner claims. This office has frequently expressed the opinion that prior recorded mortgages are superior to State taxes, certificate of which was docketed subsequently. See Section 913 (3) of the Revenue Act.

SALES AND USE TAXATION; MILL MACHINERY AND ACCESSORIES; LABORATORY
EQUIPMENT AND SUPPLIES; MEDICAL SUPPLIES; FIRE PROTECTION
EQUIPMENT; ECUSTA PAPER CORPORATION

13 May 1947

You have requested me to advise you whether or not, in my opinion, use tax is due the State because of the purchase and use by a manufacturing plant in this State of the following tangible personal property:

- (1) Medical supplies to be used in first-aid stations of the manufacturer;
- (2) Chemicals and laboratory equipment used in a laboratory devoted to research work;

(3) Alfite batteries installed on Turbo-generators.

1. The medical supplies are purchased by the plant and placed in its first-aid stations. These supplies are used by the plant physician or nurses to treat injuries sustained by the plant's employees. No charge for such supplies is made to the employees.

In my opinion use tax is due on such supplies. I can find nothing in the use tax article which affords an exemption for the sale and use of such supplies. These supplies are not sold on prescription; nor are they processed or blended and sold by a druggist. The plant is neither a physician nor a hospital. The supplies are not "mill machinery or mill machinery parts and accessories" with the meaning of Section 406 of the Revenue Act. I, therefore, advise that in my opinion use tax is due on such medical supplies.

2. I am of the opinion that use tax is due on the supplies and equipment used by the plant in its laboratory devoted to research work. The exemption of sales of mill machinery, mill machinery parts and accessories, provided by Section 406 of the Revenue Act, applies only to such machinery and parts which are used as an integral part of the manufacturing process. It does not apply to sales of equipment and supplies which are to be used in conducting research even though the manufactured product may ultimately be improved thereby. Such research does not constitute a part of the manufacturing process.

3. The Alfite batteries are sprinkler systems installed on the turbines of the plant, and are designed and used to prevent fires due to the overheating of the turbines. They are manufactured and sold by the American La France Company, which deals only in fire-fighting and fire-protection equipment. The batteries are not necessary parts of the turbines, but are used merely as safety devices.

In my opinion, such batteries do not constitute mill machinery, mill machinery parts or accessories. They are sprinkler systems, and as such are subject to the use tax. See Regulation No. 4, p. 9.

GASOLINE TAX; STANDARD OIL COMPANY; SALES TO COUNTY BOARDS OF
OF EDUCATION; REFUNDS; PAYMENT OF TAX ON RECEIPTS

AT TERMINALS

13 May 1947

You have requested my advice on the following facts: The Standard Oil Company pays the per gallon gasoline tax on its receipts at its terminals as authorized by G. S. 105-434. The Standard Oil Company later sells some gasoline to county boards of education, and the gasoline thus sold is exempted from the per gallon tax by G. S. 105-449. Heretofore Standard Oil Company has been making a claim for a refund of the tax paid on such gasoline, and your division has been making such refund. You inquire if this procedure should be followed in the future or if the Standard Oil Company should exclude from its receipts on which it pays the per gallon tax, the gasoline which will be sold to county boards of education. If such gasoline is excluded from the receipts on which the per gallon tax is paid, the Standard Oil Company will lose the tare provided for by G. S. 105-434.

In my opinion Standard Oil Company should continue to include in its receipts on which it pays the per gallon tax, the gasoline which it will later sell to county boards of education. This would seem to be the only accurate way to keep the records of the company and make them reflect the true tax liability. In addition, this procedure seems to be expressly authorized by the statute. Subsection (2) of G. S. 105-449 authorizes the Commissioner to accept in lieu of the per gallon tax invoices and supporting purchase orders disclosing the sales of gasoline to county boards of education. Thus, the Standard Oil Company could commute its tax liability on its receipts of gasoline and satisfy a portion thereof by presentation to the Commissioner of Revenue of vouchers disclosing gasoline sold to county boards of education. This would not prevent the Standard Oil Company from claiming the tare allowed by G. S. 105-434. Subsection (2) of G. S. 105-449 also provides for a refund of the per gallon tax on gasoline sold to county boards of education when the dealer has already paid the tax.

I, therefore, advise that in my opinion the Standard Oil Company should continue to pay the tax on gasoline received by it at its terminals in this State, and if gasoline is subsequently sold to county boards of education, your division should upon being presented with evidence of such sale as required by statute, refund the per gallon tax already paid.

GASOLINE TAX; PAYMENT ON RECEIPTS BASIS; TARE; GASOLINE STORED
OUTSIDE STATE; ACROSS-LINE SALES; TERMINALS AND BULK
PLANTS; SALES TO CONSUMERS AND NON-LICENSED

DISTRIBUTORS

13 May 1947

You have requested my opinion on the following facts. The Sinclair Refining Company, hereinafter called taxpayer, pays the per gallon gasoline tax on its receipts instead of on its sales of gasoline. In determining

the number of gallons of gasoline received, the taxpayer considers only its receipts at its bulk plants and does not consider as receipts for tax purposes the gasoline received by it at its terminals. When payment of the tax is made on a receipts basis, the statute provides that a tare or discount shall be allowed. No tare or discount is allowed when the tax is paid on a sales basis. Occasionally taxpayer will make sales of gasoline from its terminals to customers and non-licensed distributors. Also taxpayer occasionally sells from an out-of-state plant gasoline which is delivered for use in this State. Taxpayer contends that it should be allowed to treat this gasoline as received by it, include the same in its receipts, and thus claim the tare or deduction provided by statute. This gasoline has never been received in this State by the taxpayer at one of its bulk plants, which ordinarily is the receipt that the taxpayer classes as the taxable receipt.

G. S. 105-434 levies a tax of 6c per gallon on all motor fuels sold, distributed or used within this State. This tax is due when the motor fuel is first sold in this State or when the motor fuel is used in this State if the sale takes place outside the State. G. S. 105-431. The sale or use is the taxable event and no tare or deduction is allowed. The statute provides, however, that distributors may pay the tax on motor fuel purchased, produced, refined, manufactured, and/or compounded, less a State tare or deduction. While "distributor" is defined by subsection (b) of G. S. 105-430 as any person, etc., that has on hand or in his possession in this State, or that produces, etc., motor fuels in this State for sale, distribution or use herein, this definition is of necessity modified by the succeeding section of the statute (G. S. 105-431), which provides that the tax is on the sale in this State, or the use in this State, of such motor fuels. Thus, in providing for the payment of the tax on receipts of gasoline, rather than on sales thereof, the statute taxes only receipts in this State for sale or use herein.

Taxpayer has elected to consider as receipts in this State only the motor fuel which it receives at its bulk plants. It is obvious, therefore, that the sales by taxpayer from its terminals to consumers and non-licensed distributors are taxable transactions, and no tare or deduction is provided by statute. So long as the bulk plant is the place at which taxpayer determines his taxable receipts of gasoline, taxpayer cannot pay on the receipts basis for gasoline disposed of by it before it actually reaches the bulk plant. This would seem to dispose of the contention that across-line deliveries of motor fuel can be considered as a part of taxpayer's receipts. I am of the opinion, however, that under no construction of the statute could taxpayer pay on the receipts basis the tax due on motor fuel sold from a South Carolina plant, and delivered in this State. In my opinion the statute contemplates a receipt in this State for sale or use herein when the per gallon tax is to be paid on the receipts basis. In light of the declared purpose of the Act (G. S. 105-431) no other construction is tenable.

LICENSE TAXATION; SALES AND USE TAXATION; CLUBS SELLING MEALS TO MEMBERS AND THEIR GUESTS

15 May 1947

You have referred to me correspondence from Mr. R. F. Tuttle, Deputy Collector, and requested that I advise you on the question therein presented. Mr. Tuttle states that the Veterans of Foreign Wars have leased a club room and meeting place in which they desire to install a service bar or counter. At this bar or counter, beer, soft drinks, peanuts, potato chips, etc., will be served. These goods will be served only to members of the club and their guests. The club will appoint a committee, which will purchase these goods on behalf of the club, and members of the club will take turns serving as waiters or bus boys. Mr. Tuttle desires to know if this club must secure privilege licenses and pay sales taxes.

I am of the opinion that no sales tax is due the State by the club on account of the purchase and distribution of beer, soft drinks, etc., by the club to its members. The sales tax is levied upon the sale of tangible personal property in this State by a retail or wholesale merchant. *Section 401 of the Revenue Act*. The definition of "sale" in Section 404 is controlling in interpreting the sales tax law. This section defines "sale" to mean "any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise . . . for a consideration paid or to be paid. . . ." Thus, a taxable sale is one in which there has been a transfer of title or possession, or both. When members of the club purchase beer, etc., which they consume themselves, there is no transfer of title.

On the beer, etc., sold to guests it is my opinion that a taxable sale takes place, and the sales tax is due thereon.

So long as the club members purchase beer, etc., which they consume themselves, they are not engaged in any business, and are not required to secure any Schedule B licenses. Here again, however, if the club actually sells beer, etc., to others than club members, it will be engaged in the business of selling such commodities, and privilege taxes must be paid.

INTANGIBLES TAXATION; RESIDENT BENEFICIARY OF FOREIGN TRUST
REVOCABLE BY HIM

28 May 1947

You have requested me to advise you with respect to the question whether or not our intangibles tax is applicable to intangibles held by a New York trustee under a trust created by a former New York resident who is now a resident of this State and, under the terms of the trust, is the life beneficiary and has the power to revoke the trust at any time during his life.

The various sections of the Intangibles Tax Article of our Revenue Act impose the tax upon intangibles "having a business, commercial or taxable situs in this State." I am of the opinion that this broad language renders the taxing statute co-extensive with the State's constitutional power to tax. In other words, if the State may constitutionally tax a given intangible, it appears to me that our statutory language is sufficiently broad to impose

the tax. Therefore, it becomes necessary to inquire whether or not the State may lay a valid tax upon the intangible in the circumstances given above.

It seems to be well established that a state may not impose a tax upon a non-resident trustee as to intangibles in his possession and control merely because the beneficiaries of the trust reside in the state, where the beneficiaries have no present right to control or possession, for such a tax would violate the due process clause of the Fourteenth Amendment of the Federal Constitution. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 74 L. ed. 180. But the state wherein the beneficiaries reside may impose a tax upon their beneficial interest. *Stewart v. Pennsylvania*, 312 U. S. 649, 85 L. ed. 1101. Sect. 51 *Am. Jur.*, *Taxation*, Sec. 485; 61 *C. J.*, *Taxation*, Sec. 106.

In the instant situation, however, the North Carolina resident has more than a beneficial interest in the trust. He has the absolute right at all times to terminate the trust and to resume active control and possession of the intangible property. For purposes of taxation such a right is equivalent to ownership of the intangible property, and, in my opinion, gives such property a taxable situs in the domiciliary state. The U. S. Supreme Court, in *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. ed. 830, held that, for purposes of inheritance taxation, the retained power to revoke and to dispose of the trust property was equivalent to a fee and gave the domiciliary state the constitutional power to lay an inheritance tax upon the transfer at death. In *Safe Deposit & Trust Co. v. Virginia*, *supra*, the court was careful to stress the fact that the Virginia beneficiaries had no present right to control or possession of, or to receive the income from the intangibles held by the Maryland Trustee, and the implication is inescapable that if the Virginia residents had held such rights, the Virginia *ad valorem* tax on the intangibles would have been valid. So in another case the U. S. Supreme Court denied certiorari in a Vermont case in which the court held that the resident trustor's right to terminate the trust and to exercise a limited control over investments gave the trust property, held by a non-resident trustee, a taxable situs in the trustor's state. *City of St. Albans v. Avery*, 95 Vt. 249, 114 A. 31, Cert. den. 257 U. S. 640, 66 L. ed. 411, and dismissed, 257 U. S. 666, 66 L. ed. 425. Sec. 61 *C. J.*, *Taxation*, Sec. 221.

The fact that another state also can lay a tax upon the same intangible does not seem to affect the question. In *Curry v. McCanless*, 307 U. S. 357, 83 L. ed. 1339, the Supreme Court held that two states could lay an inheritance tax with respect to certain stocks and bonds held by an Alabama trustee for a Tennessee resident: Alabama could tax because the legal title was there, in the trustee; and Tennessee could tax because its resident in creating the trust had reserved the power to remove the trustee, to direct sale of property, to direct investments and to dispose of the property by will. Taxable situs was, therefore, deemed to be in both states. Likewise, in *Graves v. Elliott*, 307 U. S. 383, 83 L. ed. 1356, where it appeared that a Colorado resident created a trust in a Colorado trustee, retaining the right to remove trustee, change beneficiary and revoke the trust, and then became a resident of New York, the court held that both could impose an inheritance tax, Colorado because legal title of the intangibles was there; and New York because the powers retained by the resident were equivalent to ownership.

I perceive no basis of distinction in the fact that these cases involved inheritance taxes rather than *ad valorem* property taxes upon the intangibles. In either case the constitutional inquiry is the same, *i.e.* whether or not the intangible has a taxable situs within the state. If the state may constitutionally impose an inheritance tax with respect to an intangible, it may, for identical reasons, impose an *ad valorem* tax upon the same intangible.

It does not seem necessary, for present purposes, to consider whether or not the trust in the instant case is an evasive device, and I am assuming that it is not. The grounds upon which this opinion rests are not that the state will pierce the veil of the trust and place legal title in the beneficiary, but that the resident of this state has such power with respect to the intangibles as to confer upon the state the jurisdiction to tax. It is not necessary, in my opinion, to decide more than this.

If the state has the jurisdiction to tax these intangibles, it appears to me that other questions are at an end, for, as I stated above, it is my opinion that the taxing statute reaches all intangibles within the area permitted by the Federal Constitution.

Therefore, I am of the opinion that the intangibles in question are subject to our intangibles tax.

In this view of the matter there is no need to consider the taxability of the resident's beneficial interest in the trust. However, it will be observed that our court has stated that a power to appoint one's self is equivalent to a beneficial interest. *Haslen v. Kean*, 4 N. C. 700.

INHERITANCE TAXES; INSURANCE PROCEEDS; ASSIGNMENT OF
POLICY PRIOR TO 1945

26 May 1947

You have requested my opinion on the following facts:

In 1932 decedent procured a number of insurance policies on his own life and paid the premiums thereon until 1936. In 1936 decedent irrevocably assigned these policies of insurance to his wife, the beneficiary named in the policies. No incidents of ownership were retained by the decedent. From the date of this assignment until the death of decedent the assignee paid all of the premiums on the policies. Decedent died on June 7, 1943. Are the proceeds of these policies of insurance or any part thereof taxable under Section 11 of the Revenue Act?

Section 11 of the Revenue Act imposes a tax on the proceeds of insurance policies which are receivable by a beneficiary other than the executor of the insured if the insured paid all or a part of the premiums on said policies. If the insured (decedent) paid only a portion of the premiums, the proceeds of the policies are taxable in the proportion that the amount so paid bears to the total premiums paid. The fact that the insured irrevocably assigned the policies prior to his death does not render the proceeds of such policies nontaxable. Section 11, subsection 2, paragraph

(a), part (4). It is contended, however, that the proceeds of the insurance policies under consideration are wholly exempted from taxation by the following paragraph of Section 11 of the 1943 Revenue Act.

"This section shall not apply to the proceeds of insurance policies transferred . . . during the life of the decedent if the transfer did not constitute a gift, in whole or in part, under Article VII, Schedule C, of this Act, or in case the transfer was made at a time when Article VII, Schedule G, was not in effect, or if the transfer would not have constituted a gift, in whole or in part, under said Article had it been in effect at such time."

The gift tax article became effective in 1937, and the assignment in 1936 of the policies under consideration would have constituted a gift if that article had been in effect at that time. The representation of the decedent contends that the fact that the assignment of the policies was effected prior to the effective date of the gift tax article is sufficient to exempt the proceeds of the policies under the above-quoted paragraph of Section 11. He contends that the above-quoted paragraph provides for three exemptions, and this contention is based on the appearance of the disjunctive conjunction "or" in line six. These three exemptions are, he contends, (1) a transfer since the effective date of the gift tax article which did not constitute a gift under said article, (2) a transfer prior to the effective date of the gift tax article, and (3) a transfer prior to the effective date of the gift tax article which would not have constituted a gift under said article had it been in effect at the time.

In my opinion the contentions of the representative of the decedent are not correct. The appearance of the disjunctive "or" in the 1943 Revenue Act is obviously a clerical error. This is clearly demonstrated by the fact that the legislature at its next session struck out the word "or" 1945, c. 708, Sec. 1(a). It is also demonstrated by the fact that Section 11 of the Revenue Act is almost an exact copy of Sec. 811 (g) of the Internal Revenue Code, and the comparable portion of Sec. 811(g) reads as follows ". . . if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such Chapter had it been in effect at such time."

It seems clear to me that the legislature intended for the paragraph quoted above to afford only two exemptions, to wit: (1) a transfer since the effective date of the gift tax article which did not constitute a gift thereunder, and (2) a transfer prior to the effective date of the gift tax article which would not have constituted a gift under said article had it been in effect at the time. I realize that this interpretation "reads out" of the statute the term "or"; however, a failure to so interpret the paragraph would render absolutely meaningless the last part thereof. A statute should not be interpreted so as to render a portion of it meaningless. 50 *Am. Jur.*, *Statutes*, Sec. 358; *State v. Humphries*, 210 N. C. 406. In construing a statute words or clauses may be eliminated if necessary to find the legislative intent. *Ikerd v. R. R.*, 209 N. C. 270; *State v. Humphries*, 210 N. C. 406. In *State v. Humphries*, *supra*, the following appears:

"The ascertainment of the legislative intent is the cardinal rule, or rather the end and object, of all construction; and where the real design of the legislature in ordaining a statute, although it be not pre-

cisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such construction as will carry that design into effect, even though, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter. *And this rule holds good even in the construction of criminal statutes.*" Endlich Int. Stat., p. 400.

"Where words in a statute are susceptible of two constructions, one of which will lead to an absurdity, the other not, the latter is to be adopted. And where one portion or provision of a statute, if literally construed, would practically nullify the whole or some material portion of the remainder, it is a settled rule of construction, flowing from the obvious absurdity of any other, that such an interpretation shall, if possible, be placed upon the statute, *ut res magis valeat quam pereat.*" Endlich Int. Stat., p. 351.

"Where the language of a statute, in its grammatical construction, leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, or by rejecting them altogether, or by interpolating other words, under the view that the modifications thus made are mere corrections of careless language, and really give the true legislative intention." Endlich Int. Stat., p. 399. (Underlining added).

The underlined portion would seem to answer any argument based on the fact that the statute now under consideration is a taxing statute, for criminal statutes are construed strictly as are taxing statutes. See *State v. Campbell*, 223 N. C. 828, 830. However, it should be remembered that the paragraph under consideration is an exempting and not a taxing portion of the statutes. "Taxation is the rule; exemption the exception, with strict construction applicable to the latter." Concurring opinion of Stacy, C. J., in *Warrenton v. Warren County*, 215 N. C. 345, 347; *Benson v. Johnston County*, 209 N. C. 751, 757.

I, therefore, advise that in my opinion the inclusion of the disjunctive conjunction "or" in the paragraph of Section 11 of the Revenue Act under consideration was a clerical error, and that the section should be applied as if that term were not included therein.

INCOME TAXES; DEDUCTIONS; SALARIES PAID IN VIOLATION OF FEDERAL WAGE STABILIZATION ACT

27 May 1947

I have your letter of May 2, 1947, in regard to Southern Comfort Corporation, Cotton Belt Building, St. Louis 2, Missouri. It appears that this taxpayer claims a deduction from gross income on account of salaries and wages paid by it in contravention of the Federal Wage Stabilization Act. This deduction was disallowed by the Federal Government under Regulation 111, Section 29.23(a)-16. The taxpayer contends that we should not follow the rule of the Federal Department of Internal Revenue because we have no comparable regulation.

It is true that in this State there is no regulation comparable with that of the Federal Department. However, it appears to me that a wage or salary paid in an amount in excess of that permitted by the Federal

Wage Stabilization Act is not an "ordinary and necessary" expense; nor in my opinion is such wage "reasonable in amount" as required by Section 322 of our Revenue Act.

We must assume that Congress was authorized by the Constitution to control wages and salaries in the manner in which this was done in the Wage Stabilization Act. As a matter of public policy it appears to me to be essential to accept as reasonable the amounts of salaries and wages permitted by that Act. It would necessarily follow that any wage or salary in excess of the amount permitted by that Act would not be reasonable. In my opinion it is neither reasonable nor necessary to violate a valid law.

BEER AND WINE TAXES; H. B. 1051; DISTRIBUTION OF ADDED
TAXES TO COUNTIES AND CITIES

9 July 1947

I have your letter of July 3, 1947, in which you propound certain questions relating to the distribution of additional beer and wine taxes collected under subsections (a) and (r) of Section 517 of the Revenue Act. I shall state the questions in the order in which you presented them to me and shall follow each with my opinion relating thereto.

I

Prior to July 1, 1947, this office received some collections for tax-paid crowns at the increased rates effective July 1, 1947. Shall these collections made prior to July 1st be considered in determining the distributable amounts to cities and counties?

In my opinion, the answer to this question is yes. The opening sentence of subsection (t) of Section 517, of the Revenue Act, provides that from the taxes collected annually under certain portions of that section one-half thereof shall be distributed to counties and municipalities wherein beer and wine may be licensed to be sold under the provisions of the beer and wine laws. The only authority for collecting taxes at the increased rate is contained in the 1947 amendment to the Beverage Control Act. Thus, these collections, although made prior to July 1, 1947, are made under the 1947 amendment. The fact that the collections were made prior to July 1, 1947, merely indicates that they were advance payments under the 1947 amendment. I am of the opinion, therefore, that these advance collections should be considered in determining the distributive shares in the beer and wine taxes of cities and counties.

II

This office is receiving requests for refunds of 1¼c and 3 1/3c crowns purchased prior to July 1, 1947. As these refunds will be made on and after July 1, 1947, will they be chargeable against gross collections since July 1st, or shall they be charged against collections made prior to July 1st? This question is being asked as same will affect the distributable amounts to be received by counties and cities.

I am of the opinion that refunds such as those mentioned above should be charged against the collections made prior to July 1, 1947. They should not be used to reduce the amounts collected under the 1947 amendment since they were not paid under that amendment.

III

Shall the amounts distributable to cities be distributed to incorporated cities only?

In my opinion distribution should be made only to counties and incorporated cities and towns. Other provisions of H. B. 1051 indicate that the Legislature was thinking only of counties and incorporated municipalities therein. Of course, if there is an unincorporated municipality in any county entitled to a share of the taxes under consideration, the population of this unincorporated municipality (in which the beverages under consideration are licensed to be sold) should be considered in determining the county's distributive share.

IV

As this bill states that the latest Federal decennial census shall be used in determining the amounts of excise tax distributable to each county and municipality entitled to the same, do cities share in this distribution which have dissolved their incorporation since 1940 and effective July 1, are no longer in existence? If a city has been incorporated since 1940, will it be entitled to any distributable amount under this bill, If cities which have dissolved their incorporation are not entitled to a distributable share under this bill, and if cities incorporated since 1940 are not entitled to a distributable share, will the amounts distributable under this bill in this area accrue to the county?

A

Municipalities which have been dissolved prior to July 1st are not entitled to share as municipalities in the taxes to be distributed. The population of the area should be considered in determining the county's share of the tax but the dissolved municipality should receive no share directly.

B

A municipality which is incorporated subsequent to 1940 and prior to July 1, 1947, is, in my opinion, entitled to a distributive share of the taxes collected if it allows the sale of beer and wine therein. There is nothing in the Act which prohibits such municipalities from sharing in the taxes and I am compelled to advise that, in my opinion, they should be allocated a share. This conclusion is not weakened by the fact that there is no 1940 Federal census for such municipalities. The census referred to in the Act is a method for determining the amount of a municipality's share and does not determine the right of a municipality to share in the taxes. In such a case it is my opinion that you should determine such municipality's share by the census conducted by the municipality or by any other official body or agency. If no census has been taken, then it is my opinion that you must determine the population of the municipality under some procedure to be established by you.

C

A municipal corporation which was dissolved prior to July 1, 1947, is not entitled to any share of the taxes to be distributed. The population of such area, however, should be considered in determining the county's share of the taxes. I assume, of course, that the former municipality is not in an area in which the sale of beer and wine is prohibited.

V

If two incorporated cities merge and extend their city limits and take a new census, what population basis shall we use in determining the distributable amount due the surviving city?

In my opinion, you should take the 1940 census of the two incorporated cities or towns, which merge, and make the distribution to the new or surviving city on that basis. In other words, when two municipal corporations merge the surviving, or new corporation, should receive a share of the taxes based on the 1940 Federal census of the two merged corporations. In the case of Jonesboro and Sanford, the distribution should be made on the basis of the 1940 census of Jonesboro and the 1940 census of Sanford and the funds should be distributed to the new or surviving municipal corporation.

VI

If a city has extended its city limits since 1940 and taken a new census within the extended area, what population shall be used in determining the distributable amount due such city?

In my opinion, the 1940 Federal census should be used in making the distribution. Subsection (t) of Section 517 of the Revenue Act fixes the population of the city as of 1940 as the basis upon which the distribution shall be made and there is no provision for a change in the population by any subsequent census. Section 933 of the Revenue Act applies only to the levying of license taxes and, in my opinion, should not be used in distributing funds under Section 517.

FRANCHISE TAX; PURCHASE OF STOCK OF BUSINESS CORPORATION;
REMISSION OF FRANCHISE TAXES DUE AND UNPAID

10 July 1947

You have requested my opinion on the following facts:

The Gaston Memorial Hospital, Inc., which, for the purpose of this opinion, I shall consider as exempted from the provisions of the franchise tax article by Section 213 of the Revenue Act, has acquired all of the stock of the City Hospital, Inc., a corporation not exempted from the franchise tax article. Prior to this acquisition of stock by the exempt corporation, the non-exempt corporation had incurred a franchise tax liability. If satisfaction of this liability is insisted upon, the exempt corporation will be required to pay the same. Since this is true, the exempt corporation contends that a satisfaction of the franchise tax liability should not be insisted upon. In other words, the exempt corporation contends that its exemption from the franchise tax should extend to and extinguish the franchise tax liability of the non-exempt corporation, the stock of which the exempt corporation has acquired.

I can find no authority for the remission of the franchise tax liability incurred by the non-exempt corporation. The exemption of the exempt corporation extends only to its franchise tax liability; it does not extinguish liabilities already incurred by a business corporation even though the exempt corporation is required to pay the same because of some contractual relationship between the two.

I, therefore, advise that in my opinion you should proceed to collect the franchise tax due by City Hospital, Inc.

B. C. REMEDY COMPANY; DEDUCTION FROM GROSS INCOME OF INCOME
EARNED AND TAXED IN GEORGIA

11 July 1947

I have your letter of June 17, 1947, relating to the above subject matter. I have carefully considered all of the facts presented to us by the representative of the B. C. Remedy Company and I am of the opinion that the facts so presented do not disclose that the B. C. Remedy Company had an established business in Georgia. Since Georgia levies an income tax, it is my opinion no deduction should be allowed under Section 322 (10) of the Revenue Act for income earned and taxed in Georgia.

FRANCHISE TAXES; EXEMPTIONS; BRICK AND TILE SERVICE, INC.

15 July 1947

You have submitted to me for examination the certificate of incorporation of Brick and Tile Service, Inc., (hereinafter, for convenience, called taxpayer) and an amendment thereto. You inquire if this corporation is exempt from the franchise tax as a business league under Section 213 of the Revenue Act.

As amended the charter of taxpayer provides that taxpayer is a non-profit organization. It is organized to do research work for the purpose of increasing the use of structural clay products; to conduct advertising and publicity campaigns; to assist in the training of apprentices, mechanics and artisans; to aid and promote courses in bricklaying, etc., in colleges and schools; to disseminate information on problems affecting the manufacture and distribution of burned clay products and to collect and distribute historical information relating to burned clay products. In addition taxpayer has all of the rights and authority conferred upon corporations by the laws of the state in which it was incorporated.

By part fourth of the certificate of incorporation it is provided that there shall be two types of stock issued by taxpayer, to wit: common and preferred. This same part of the charter provides that the preferred stockholders shall be entitled to a cumulative dividend at the rate of 7% per annum.

I am of the opinion that taxpayer is not a business league, no part of the net earnings which inures to the benefit of any private stockholder, individual or other corporation, as is required by Section 213 of the Revenue Act for exemption from the franchise tax article. While the charter of taxpayer provides that it is a non-profit organization, the charter also contains a provision that preferred stockholders shall receive 7% cumulative dividends. It would seem thus that taxpayer is in reality not a non-profit organization. Cf. *Uniform Printing and Supply Company v. The Commissioner*, 33 BTA 1073; Cf. *Appeal of Uniform Printing and Supply Company*, 9 BTA 251.

Consideration should be given to the possibility that taxpayer will be unable to conduct the various activities authorized by its charter and still be exempt from the franchise tax. A business league may not engage in a regular business of a kind ordinarily carried on for profit and retain its tax exempt status under Section 213. Cf. *P-H Federal Tax Service*, paragraph 4369 *et seq.*

SECTION 517(9) OF THE REVENUE ACT

19 August 1947

You have requested this office to give you an opinion with respect to the first sentence of the above subsection, which reads as follows:

"From the taxes collected annually under subsection (a) and subsection (r) of this section amounts equivalent to one-half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold under the provisions of this Article."

Your question concerns the interpretation of the italicized portion of said sentence.

I am of the opinion that the phrase "wherein such beverages may be licensed to be sold" means that distribution is to be made to those local units wherein there are no legal impediments to the sale of wine and/or beer. If by virtue of some special act of the legislature or by virtue of the exercise by the local governing body of authority conferred upon it by the legislature or as a result of a special election in which the majority were opposed to the sale of wine and/or beer, wine and/or beer licenses may not be issued in a particular county or municipality, the area in which such licenses may not be issued would be excluded from participating in the distribution of the beer and wine taxes. If, however, beer and/or wine licenses may legally be issued in a particular county or municipality, I am of the opinion that such county or municipality would not be excluded from participation in the distribution of the beer and/or wine tax merely because no qualified person appeared and made application for license to sell beer and/or wine.

STATUTE OF LIMITATIONS; INCOME TAXES

23 August 1947

You have requested me to advise you as to the statute of limitations applicable to refunds and assessments of income taxes since the 1947 amendments to Sections 334 and 335 of the Revenue Act. This matter was discussed at length with you, Mr. Gattis and Mr. Wilkins and my conclusions were stated to you at that time. For your guidance, however, you have requested that I express my opinion to you in writing. In view of the full discussion of the problem which occurred at the conference mentioned I shall state only the conclusions reached and not the reasons therefor.

When no federal revenue agent's report is involved, and in the absence of fraud, the three year statute of limitations applies to refunds and to assessments. Section 335 of the Revenue Act.

When there has been a federal correction of income and the taxpayer has, within two years, given notice of such correction as required by Section 334, the three year statute of limitations applies to assessments or refunds to be made by the department. Section 335. Of course, any refunds

or assessments to be made concerning a year which, except for the federal agent's report would be barred by the three year statute of limitations, may be made only if the income of such year is corrected by the report. In other words, the statute of limitations is made inapplicable only by the federal revenue agent's report and then only to items covered by the report.

When there is a federal correction of income and the taxpayer does not, within two years, give notice of such correction to the department as required by Section 334, the taxpayer forfeits any rights which he may have to any refunds due by such federal correction of income. Section 334 of the Revenue Act. In such a case the department is authorized to make assessments for additional income taxes only for a period of five years. Section 335 of the Revenue Act. If a taxpayer is due a refund independently of the revenue agent's report, i.e., the overpayment was made within three years, he does not forfeit his right to this refund because of his failure to give notice of federal correction of income.

If the taxpayer fails to file an original return with the department, the five year statute of limitations applies. Section 335 of the Revenue Act. In fraud cases no statute of limitations applies.

BAD CHECKS; ASSESSMENTS OF PENALTY; J. F. GENTRY, TAXPAYER

3 September 1947

This office has been advised that one J. F. Gentry, under date of June 30, presented a check in the amount of eighty-five dollars (\$85.00), drawn on the Bank of Madison, to the State Department of Revenue in payment of license taxes. The check was returned by the Bank with the notation, "Not Sufficient Funds." We have before us a copy of a letter on the letterhead of the Bank of Madison under date of August 28, signed by Mr. John B. Gatling, Cashier, and addressed to the North Carolina State Department of Revenue, in which the Bank advises that the check referred to above was returned by the Bank to the Department of Revenue through error, as Mr. Gentry had on deposit at the time the check was presented sufficient funds to take care of the check. The Bank further advises that sufficient funds have been available since the first time the check was presented, and on its return, to the date the letter was written on August 28.

Section 907 of the Revenue Act provides that when any uncertified check is tendered in payment of any obligation to the Department of Revenue, and such check is returned to the office of the Commissioner unpaid on account of insufficient funds of the drawer of said check in the bank upon which the check is drawn, an additional tax, equal to ten per cent (10%) of the tax due or a minimum of one dollar (\$1.00), shall be imposed. We are of the opinion, however, that the check in question is not a bad check within the meaning of Section 907 of the Revenue Act, nor a "worthless check" within the meaning of G. S. 14-107, making illegal the issuance of worthless checks. The check in question was returned not because the drawer had in deposit insufficient funds, but through an error on the part of the Bank; and it is the opinion of this office that the penalty provided by Section 907 does not apply to this case.

INCOME TAXES; DEDUCTIONS; CONTRIBUTIONS TO PEACE OFFICERS RELIEF
AND PENSION FUND FOR THE CITY OF WINSTON-SALEM
AND FORSYTH COUNTY

5 September 1947

You have requested me to advise you whether or not, in my opinion, contributions made by individuals and corporations to the Peace Officers Relief and Pension Fund for the City of Winston-Salem and Forsyth County would be deductible from gross income for income tax purposes. Hereinafter the Peace Officers Relief and Pension Fund for the City of Winston-Salem and Forsyth County shall, for convenience, be referred to as donee.

Donee was created by chapter 272 of the Public-Local Laws of 1929 as amended by chapter 443 of the Public-Local Laws of 1931. By section 3 of the 1929 Act referred to above, donee is classified as an association. The revenue of donee is derived from costs to be taxed in criminal actions tried in Forsyth County and from contributions. Donee has an existence separate and apart from the City of Winston-Salem and the County of Forsyth. The purposes for which donee was organized are set out in section 7 of the Act of 1929. That section reads as follows:

"The money so paid into the hands of the Treasurer of the Winston-Salem, and Forsyth County Officers Protective Association shall be known as the Winston-Salem and Forsyth County Peace Officers Relief Fund, and shall be used as a fund for the relief of members of said Association who may be injured or rendered sick by disease contracted in the actual discharge of duty as a peace officer, and for the relief of their widows and children, and if there be no widows or children, then dependent mothers of such officers killed or dying from disease so contracted in such discharge of duty, and as a pension fund for peace officers grown old in the line of duty, and also for the benefit of special officers or citizens injured while acting as such peace officers, and for the further benefit of the widows and children of such officers or citizens who may be killed while acting as such peace officers. All persons entitled to benefits under this section shall make application to the Executive Board, above provided for, and said Executive Board shall investigate each such application and shall determine what benefits shall be paid. The decision of the Executive Board shall be final and conclusive as to what persons are entitled to benefits and as to the amount of benefit to be paid, and said Executive Board shall have power to increase or decrease monthly benefits at any time, and no action at law or suit in equity shall be maintained against said association to enforce any claim or recover any benefit under this article or under the Constitution or by-laws of said Association; but if any officer or committee of said Association omit or refuse to perform any duty imposed upon him or them, nothing herein contained shall be construed to prevent any proceeding against said officer or committee to compel him or them to perform such duty."

From the above quoted provision it is clear that the donee is a non-profit association and it is provided in section 9 that the members of the Executive Board shall serve without compensation while the secretary receives only \$25.00 per month as salary.

In my opinion, contributions to this organization will constitute contributions to an association organized and operated exclusively for charitable purposes within the meaning of subsection (9) of section 322 of the Revenue Act. As a result contributions to the association will be deductible from gross income for income tax purposes. C. B. 1919, p. 148. The headnote of that solicitors memorandum, which correctly epitomizes the same, reads as follows:

"Contributions made to a fund established for the pensioning of members of a municipal police force, where such fund is in control of a committee constituted by law, are contributions to charity within the meaning of section 214(a), paragraph 11, of the Revenue Act of 1918, and are deductible in computing the net income of the persons making such contributions."

Such contributions, in my opinion, are contributions made for the improvement of the county and municipal police forces. As such, they constitute contributions made for a charitable purpose. 10 *Am. Jur., Charities*, section 79; *Vidal v. Philadelphia*, 11 L. ed. 205.

INCOME TAXATION; DEDUCTIONS; LOSS FROM SALE OF PROPERTY IN ANOTHER STATE; LOSS FROM SALE BY TRUSTEE AFTER TERMINATION OF TRUST

8 September 1947

You have requested my opinion in this matter. The taxpayer is Mr. Williamson W. Fuller, II, who is represented in this matter by Mr. Paul Dana, Accountant, Pinehurst, North Carolina.

You have handed me your entire file in this matter and it appears from an examination thereof that the taxpayer for the year 1942 claimed as a deduction from gross income reportable to this state a loss resulting from the sale of certain rental property in New York City and in Ossining, N. Y. The taxpayer's proportionate and undivided interests in this property was derived through the will of his grandfather, W. W. Fuller, the will of his father, Thomas S. Fuller and the will of his sister, Margaret Hereford.

You disallowed this deduction on the ground that the property on which the loss was claimed appeared from the taxpayer's return to have been owned at the time of sale by the trustee and not by the taxpayer and that the loss, if any, was a loss of the trustee and not of the taxpayer.

On the other hand, the taxpayer takes the position that upon the death of Thomas S. Fuller and Margaret Hereford the trust terminated and title shifted from the trustee to the taxpayer and his two sisters by virtue of the exercise of the power of appointment in the wills of Thomas S. Fuller and Margaret Hereford. Therefore, the taxpayer contends that at the time of the sale of the property the title to said property was in the taxpayer and his two sisters and, therefore, the loss from the sale thereof was theirs rather than the trustee's.

The taxpayer contends further that inasmuch as he has been reporting to North Carolina the annual rental income from this property, North Carolina should now allow the capital loss from the sale thereof as a de-

duction from North Carolina income. The returns filed by the taxpayer do not identify such income as rents from real estate but include the same with other income as income from the trust.

This office has previously expressed the opinion that a taxpayer may not deduct from gross income attributable to this state, any loss from property or business in another state. For that reason we are constrained to advise you that in our opinion the provisions of our Revenue Act do not permit the deduction of this loss for the year 1942, even though the loss may have been one sustained by the taxpayer rather than the trustee.

However, at a conference in my office with the taxpayer's representatives, at which you were present, there arose the further question whether or not the taxpayer is entitled to a refund of taxes paid in years prior to 1942 on income which, according to his contention, was derived from the New York real estate.

Assuming that the right to a refund is not barred by any statute of limitations, the answer to this further question depends upon whether or not the taxpayer was entitled to a deduction of such income under Section 322 (10) of 1939 and 1941 Revenue Acts, which provided in part as follows:

"Resident individuals and domestic corporations having an established business in another state or investment in property in another state, may deduct the net income from such business or investment, if such business or investment is in a state that levies a tax upon such net income . . ."

It is my opinion that in order to be entitled to a deduction under this provision, the taxpayer must be classified as one having an "established business" or "investment in property" in the other state. Thus, the question arises whether or not the taxpayer had such business or investment in this case. This office has ruled that the trust itself is not a business or investment within the meaning of this provision. Therefore, it becomes important to ascertain the relationship of the taxpayer to the real estate on which the rents were collected. This question depends upon an application of New York law to the provisions of the wills of W. W. Fuller, Thomas S. Fuller and Margaret Hereford.

It appears that W. W. Fuller died in 1934 leaving him surviving his wife and five children, including Thomas S. Fuller and Margaret Hereford. Thomas S. Fuller died in 1940 leaving three children, among whom the taxpayer is one. Margaret Hereford died in 1941 leaving the taxpayer and his two sisters surviving. The wife of W. W. Fuller died intestate in 1939.

From an examination of the three wills it appears that W. W. Fuller devised a life estate in trust to his wife and each of his five children with a general power of appointment by will. When the wife of W. W. Fuller died intestate in 1939, without having exercised her power of appointment, it seems clear that her share under the terms of the W. W. Fuller will passed in equal proportions to the five surviving children of W. W. Fuller.

Thomas S. Fuller, son of W. W. Fuller and father of the taxpayer, subsequently died leaving a will in which he exercised his power of appointment, both with respect to the interest derived directly from his father, W. W. Fuller, and with respect to the interest which resulted from his

mother's failure to exercise her power of appointment, by leaving the former interest to his three children in trust and the latter interest outright to them.

Margaret Hereford, daughter of W. W. Fuller, likewise subsequently died, having exercised her power of appointment as to her interests in the property in favor of the three children of her deceased brother, Thomas S. Fuller.

It appears from these facts that upon the death of Margaret Hereford in 1941 the trust created by the aforesaid wills was terminated. The question then arose whether or not under the law of New York, title to the trust thereafter was in the taxpayer instead of in the trustee. I submitted this question to the trustee, the Guaranty Trust Company of New York, which referred the matter to Jackson, Nash, Brophy, Barringer & Brooks, their counsel, from whom I received a reply to the effect that it is well established in New York that upon the falling in of a trust, as was the situation upon the deaths of both Thomas S. Fuller and Margaret Hereford, title to any real estate theretofore held in such trust vests immediately in the remaindermen without the necessity of any act or intervention on the part of the trustee and it matters not whether the remaindermen of the trust are determined by reason of the exercise of a power of appointment by the living beneficiary or by the provisions of the testamentary trust itself. Counsel for the trustee stated that cases in support of this principle are legion in New York and they cite the following cases: *Matter of Cruikshank*, 169 Mis. 514; *Matter of Miller*, 257 N. Y. 349, 356; *Watkins v. Reynolds*, 123 id. 211, 217; *Townsend v. Frommer*, 125 id. 446, 461; *Phoenix v. Livingston*, 101 id. 457; *Chisholm v. Hamersly*, 114 App. Div. 565, 569.

This principle seems to be in accord with the law in this state. The Legislature of North Carolina many years ago adopted the principle of the the Statute of Uses. G. S. 41-7. It seems to be well settled in this state that in the case of a passive trust or in the case of a trust which has terminated, the statute executes the use and merges the legal and equitable titles in the beneficiary. *Fisher v. Fisher*, 218 N. C. 42; *Baker v. McAden*, 118 N. C. 740; *Chinnis v. Cobb*, 210 N. C. 104.

For the reasons set out above I am of the opinion that, assuming that the taxpayer's right to a refund has not been barred by the statute of limitations, the taxpayer is entitled to a deduction of income derived from the renting of the aforesaid property after termination of the trust.

As far as the taxpayer's interest in the real estate is concerned, it appears that the trust terminated in part with the death of Thomas S. Fuller in 1940 and in part with the death of Margaret Hereford in 1941. Therefore, it would seem that the taxpayer acquired a part of his interest in the real estate in 1940 and another part in 1941. To the extent that the taxpayer owned the property at the time he received the rental income therefrom, I am of the opinion that he was entitled to a deduction therefor under section 322 (10); and if he did not claim this deduction it is my opinion that he may do so now and obtain a refund to the extent that he is not barred by the statute of limitations.

In determining whether or not a refund is barred, your attention is directed to the following proviso, which was added to section 937 of the Revenue Act by chapter 501 of the Session Laws of 1947:

"Provided, further, that irrespective of any demand for refund, such overpayment may be credited upon any taxes against the same taxpayer which shall have become due prior to January 1st, 1947, if such taxpayer shall request such credit prior to paying the taxes against which the credit may be made. (1941, c. 50, s. 10 (e); 1947, c. 501, s. 9 (b).)"

LICENSE TAXES; HOTELS; TOURIST HOMES; BOARDING HOUSES;
BENT CREEK RANCH

16 September 1947

You have submitted to me your file on the Bent Creek Branch and requested that I advise you whether license should be procured for said ranch as a hotel under Section 126 of the Revenue Act or as a tourist home under Section 126½.

Bent Creek Ranch is located near Asheville, North Carolina, and adjoins Pisgah National Forest. There are accommodations for 35 guests and because of this fact reservations for accommodations must usually be made in advance. The rates charged for accommodations include meals. Guests are solicited by pamphlets and brochures distributed by the owners.

The ranch consists of a main ranch building and a number of individual cabins and other buildings. Meals are served family style in a main dining room and are served only at stated hours. No rooms are rented without meals. There is no room service and no connecting telephones. No transient guests in the sense of overnight guests or travelers are solicited or accepted at the ranch.

The owners of the ranch contend that they are not operating a hotel such as the Sir Walter or Carolina hotels but are in reality operating a tourist home or first class boarding house.

In my opinion the owner of the ranch should procure the license prescribed by Section 126 of the Revenue Act for an American plan hotel. Transient guests are solicited by the distribution of pamphlets or brochures. It is true that the overnight traveler is not solicited, but this is because of the size of the establishment, the type of entertainment it offers, and its location. However, "a weekly rate and a lengthy stay do not, in the absence of taking up a permanent abode at a hotel, take away from a person the status of a 'hotel guest.'" 19 Words & Phrases, Permanent Ed., p. 677, citing *Gross v. Saratoga Hotel & Restaurant Co.*, 176 Ill. app. 160. "A hotel is none the less a hotel from the fact that it was not immediately on a highway, or that the grounds on which it stood were inclosed and the gates closed at night. Its location, and the extent of the ground surrounding it, and the manner in which those grounds were improved and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made it more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it." 19 Words & Phrases. Permanent Ed., p. 670,

citing *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 26 p. 1099. Guests are solicited from the public generally and the ranch is held out as a place where food and lodging will be furnished to those who are acceptable to the other guests. This is sufficient to constitute the ranch a hotel within the meaning of Section 126 of the Revenue Act. *Cf. Holstein v. Phillips*, 146 N. C. 366. A hotel keeper is authorized to deny lodging to any person of bad or suspicious character, or of vulgar habits, or who is objectionable to other guests. *State v. Steele*, 106 N. C. 766.

Because of the limited accommodations only a few guests are accepted and these usually have to make reservations far in advance. This does not alter the above conclusion, however, for no hotel is required to accept guests unless accommodations are available. See *Cromwell v. Stephens*, N. Y., 3 abb. prac., N. S. 26; See *In re Brewster*, 80 N. Y. S. 666. 39 misc. 689.

The ranch receives guests for less than a week and for more than a week, depending upon the desires of the guests. This is the usual hotel practice.

Since the ranch is not operated principally for permanent boarders, it is not a boarding house. *Holstein v. Phillips*, 146 N. C. 366, 371; *State v. McRae*, 170 N. C. 712; 19 Words & Phrases, Permanent Ed., p. 671.

A tourist home is a term generally understood in common parlance and usually means a place where accommodations for one who travels from place to place or who makes a tour. *Jones v. State*, 64 Ga., app. 376. 13 S. E. 2d. 462, 465. In my opinion the ranch does not fall within this definition.

The Department of Revenue has long interpreted Section 126 to cover establishments operated as the Bent Creek Ranch is operated. This interpretation, long acquiesced in by the legislature, may be considered to have the force of law. *Cannon v. Maxwell*, 205 N. C. 420; *Powell v. Maxwell*, 210 N. C. 211; *Valentine v. Gill*, 223 N. C. 396; *Crane v. Commissioner*, 91 L. ed. (adv. ops.) 931.

INCOME TAXES; DEDUCTIONS; INCOME EARNED BY RESIDENT IN SISTER STATE
LEVYING AN INCOME TAX; RESIDENT MEMBER OF A FOREIGN PARTNER-
SHIP; DEDUCTIBILITY OF RESIDENT PARTNER'S SHARE
OF PARTNERSHIP EARNINGS

19 September 1947

You have referred to me a letter from Honorable W. J. Adams, Jr., Attorney at Law, and requested that I advise you concerning the question presented by that letter.

Prior to January 1, 1947, Mrs. Mary J. Ordway (hereinafter, for convenience called taxpayer) was one of four heirs of a decedent who died a resident of Alabama. The executors of the decedent's estate were residents of the State of Alabama. This estate has been completely settled and the property which heretofore comprised the estate has been transferred to a partnership consisting of taxpayer and the other heirs of the decedent. This transfer was effective as of January 1, 1947. The partnership conducts its business from its headquarters in Alabama. The State of Alabama levies an income tax.

Taxpayer's question is whether or not she is entitled to deduct from her gross income for income tax purposes in North Carolina her share of the partnership earnings which she reports to the State of Alabama for taxation.

Paragraph (b) of subsection 10 of Section 322 of the Revenue Act provides, in part, that "resident individuals having an established business or an investment in real or tangible property in another State or other States may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other State or States which levies or levy a net income tax." Since taxpayer is a resident of North Carolina and since she will report to the State of Alabama for taxation the income which she receives from the partnership located in Alabama taxpayer is entitled to deduct the income which she receives from the partnership, if it can be determined that she, as distinguished from the partnership, has an "established business" or an investment in tangible property in Alabama.

While it is true that for some purposes a partnership is an entity, separate and apart from its individual members, this office has heretofore expressed the opinion that for income tax purposes, the earnings of a partnership should be considered as the earnings of the individual partners and the business of the partnership should be considered as the business of the individual partners. In other words, this office has expressed the opinion that the partnership should be disregarded and the business and income should be treated as that of the individual partners. These opinions were expressed after long and careful study, and I see no reason why I should, at the present time, advise that they not be followed.

The conclusions heretofore reached by this Department are supported by certain provisions of our Revenue Act. For example, subsection 3 of Section 318 of the Revenue Act indicates that our income tax laws look to the individual partner and not to the partnership for the payment of income taxes. This subsection contemplates that the partnership shall be disregarded. The same is true of Section 328 of the Revenue Act.

I, therefore, advise that, in my opinion, if taxpayer earns income through a partnership which has an established business in the State of Alabama and she reports that income to the State of Alabama for income taxation, she is entitled to the deduction provided for in Paragraph (b) of subsection 10 of Section 322 of the Revenue Act.

INHERITANCE TAXES; WILL CONTESTS; COMPROMISES; FAMILY SETTLEMENT;
COMPUTATION ACCORDING TO DISTRIBUTION UNDER THE WILL
INSTEAD OF COMPROMISE; COMPUTATION OF TAXES

24 September 1947

You have requested my opinion upon the following question:

When a testator disposes of his estate and a contest as to the validity of the will arises and said contest is concluded by a consent judgment in which the validity of the will is upheld and the heirs agree, with the approval of the Court, to a distribution of the property contrary to the terms of the will, is the inheritance tax computed on the basis of the distribution under the terms of the will or the actual distribution under the terms of the compromise or family settlement?

The answer to this question has not been settled by the Supreme Court of North Carolina. The out-of-state authorities are not all in accord as to what the correct answer is. The Federal Courts have held that property acquired by an heir or claimed heir of a testator as a result of a compromise

of a suit contesting the validity of testator's will (in which the validity of the will is upheld) is property acquired by "bequest, devise, or inheritance" as these terms are used in Section 22 (b) (3) of the Internal Revenue Code and is exempt from income taxation by that section. *Lyeth v. Hoey*, 305 U. S. 188, 83 L. ed. 119; *U. S. v. Gavin*, (CCA-9) 159 F. 2d, 613.

The rationale of these decisions is that, as a result of the compromise, property did pass from the decedent to his heirs and in the exemption provision of the Revenue Act Congress has used comprehensive terms embracing "all acquisitions in the devolution of a decedent's estate." *Lyeth v. Hoey*, *supra*. Thus, the Court held this to be an "inheritance" within the meaning of the Federal Income Tax Laws.

The Federal Courts, like some State Courts, have held that in determining the amount of inheritance or estate taxes due and the exemptions from said taxes, the terms of the compromise and not the will should control. P. H. Federal Tax Service 1947, paragraph 24,203-C; Annotation 78 A. L. R. 716; Annotation 137 A. L. R. 664; Annotation 139 A. L. R. 1524. This conflict of authorities is pointed out in 28 *Am. Jur., Inheritance, Estate and Gift Taxes*. Sections 219, 220 and 221.

In determining how the North Carolina Inheritance Taxes should be computed in case of a compromise of a will contest, it is the will of the Legislature which controls. *Cf. Lyeth v. Hoey*, 305 U. S. 188, 194. Thus, if we are able to determine whether the Legislature intended for our inheritance taxes to be computed on the basis of a distribution according to the terms of the will (the validity of which is upheld) or according to a distribution under the terms of the compromise agreement, we will have determined the answer to the question stated above.

In 1935 the Revenue Act imposed a tax upon the transfer of property "when the transfer is by will or by the intestate laws of this state from any person dying, seized or possessed of the property while a resident of the state." Paragraph first of Section 1 of the Revenue Act of 1935. In 1935 the case of *Reynolds v. Reynolds*, 208 N. C. 578 reached the Supreme Court of North Carolina. In that case the State of North Carolina had compromised its claim for inheritance taxes and filed a brief in the Supreme Court seeking to uphold its compromise. One of the reasons given for the compromise by the state was the uncertainty of whether the terms of the will of the decedent should be followed in computing the inheritance taxes or whether a compromise agreement entered into between the heirs should be followed in computing said tax. At page 629 of that case the following appears:

"In the brief of the Attorney-General and his able assistants is the following: 'There is still an open question in this State as to the basis of computation of the inheritance tax in cases where the property rights of the parties have been litigated and their interest determined by a compromise judgment. The holdings in other jurisdictions, where this question has arisen, are about evenly divided and contradictory. Note 78 A. L. R., 716. In the most favorable aspect of the controversy, the State could not hope to be materially benefited by independently litigating the serious factual questions involved, either as to the amount or security of the tax, and, therefore, the offer of compromise was accepted.' "

At the next session of the Legislature paragraph first of Section 1, of the Revenue Act, was rewritten to read as follows:

"When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State; or when the transfer is by settlement, contract, or agreement, or by any court order or otherwise, to any person or persons, by reason of claim or claims arising by virtue of intestate laws, in controversies or contests as to the probate or construction of any will or wills, or any trust, or other instrument, executed or created by any person dying seized of the property while a resident of this State."

With this provision in the statute it was clear that the terms of the compromise or family settlement should be followed in computing the inheritance taxes. This provision, however, remained in the statute only four years.

In 1941 paragraph first of Section 1, of the Revenue Act, was rewritten as follows:

"When the transfer is by will or by intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State."

The repeal of the provision of paragraph first providing for a recognition of compromises of will contests clearly indicates that the General Assembly intended for the terms of the will to be followed when its validity has been established. The repeal of the provision in paragraph first did not return the law in North Carolina to an unsettled state but was, in my opinion, tantamount to an adoption of a provision exactly the opposite of the repealed provision.

Since the answer to the question must be found by an interpretation of the statute and in view of the legislative history of our Inheritance Tax Law, I am unable to reach the conclusion that the terms of the compromise agreement should be followed as against the terms of the will (the validity of which is upheld) in distributing the estate for the purpose of determining inheritance tax liability.

The provisions of paragraph first of Section 1, of the current Revenue Act, are exactly the same as those appearing in the Revenue Act of 1941.

I, therefore, advise that in my opinion the terms of the compromise agreement should be disregarded and the terms of the will should be followed in distributing the estate for inheritance tax purposes.

INCOME TAXES; FOREIGN CORPORATIONS; COMPANIES LEASING OR RENTING MOTION PICTURE FILMS

7 October 1947

Your file concerning proposed additional income and franchise tax assessments against Metro-Goldwyn-Mayer for 1943-44 has been submitted to me for my opinion as to whether or not the proposed assessments should be made.

Metro-Goldwyn-Mayer is engaged in the production of motion picture films and the distribution of those films. The only business which Metro-Goldwyn-Mayer does in North Carolina is the leasing or renting of motion picture films produced wholly outside the State to exhibitors within the State.

For many years prior to 1943 M. G. M. allocated a portion of its income to North Carolina by applying to its total income the two factor formula specified in subdivision 2, of subsection II, of section 311 of the Revenue Act. In 1943 it was proposed to place M. G. M. on a gross receipts basis as provided in subdivision 3, of subsection II, of section 311 of the Revenue Act. If M. G. M. is required to allocate a portion of its total income to North Carolina by the use of a single factor formula, additional income taxes will be due the state for the year 1943-44. The proposed assessment is based on the application of the single factor formula to M. G. M.'s income. Whether the proposed assessment should be made is the question which you have presented to me for decision.

Subdivision 2, of subsection II, of section 311 of the Revenue Act, provides that when the principal business of a company in this state is selling, distributing or dealing in tangible personal property within this state, the entire net income of such company will be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios: Property within this state to property everywhere; sales within this state to sales everywhere. The word "sales," as used in the above cited subsection, is defined so as to include the rental of tangible personal property. Thus, if the films, which are rented or distributed by M. G. M., are tangible personal property, then, M. G. M. should apportion its entire net income to the State of North Carolina for income tax purposes by application thereto of the two factor formula mentioned above.

I have been unable to find any case which decides whether motion picture films are tangible or intangible property in so far as income tax formulae are concerned. Motion picture films have, however, been determined to be tangible personal property. *United Artists Corporation v. Taylor*, 273 New York, 334, 7 N. E. (2d) 254; *Saenger Realty Company v. Crossjean* (La. 1940) 193 So. 710. Our own Sales Tax Statute, which applies only to sales of tangible personal property, expressly exempts therefrom the lease or rental of motion picture films, thus indicating that without the exemption the lease or rental of motion picture films would be covered by our Sales Tax Law. Subsection 8 of section 404 of the Revenue Act.

While a distinction has been drawn between the physical thing, used as a carrier, and the intellectual idea, which is to be transmitted, *Universal Film Company v. Copperman*, 218 Fed. 577, this does not mean that a company engaged in distributing films is not engaged in distributing tangible personal property.

The films distributed by M. G. M. are at least in some respects tangible personal property and I advise that in my opinion the principal business of M. G. M. in this state is that of selling, distributing or dealing in tangible personal property and the entire net income of M. G. M. should be apportioned to North Carolina by the application to said net income of the two factor formula prescribed by subdivision 2, of subsection II, section 311 of the Revenue Act.

Since the Franchise Tax Statute is the same as the Income Tax Statute, the opinion herein expressed is equally applicable to M. G. M.'s franchise tax liability.

LICENSE TAXES; CIRCUSES; VEHICLES USED; TRACTOR AND TRAILER
CONSTITUTE ONE VEHICLE

7 October 1947

You have requested me to advise you whether or not, in my opinion, a tractor and trailer should be considered as one or as two vehicles in determining the amount of the Schedule "B" tax to be collected from circuses, exhibitions, etc., traveling by motor vehicles.

Section 106 of the Revenue Act levies a tax on shows and exhibitions traveling by automobiles, trucks, or other vehicles, according to the number of vehicles used in transporting show property or personnel. That section contains the following sentence: "It is the intent of this subsection that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted in computing the tax."

I am of the opinion that a tractor and trailer should be classified as one vehicle for the purpose of determining the amount of tax due by a circus under Section 106 of the Revenue Act. The purpose of using vehicles to determine the amount of the tax due by a circus was to base the tax on the actual size of the circus. To get a true picture of the size of the circus, it seems to me that a tractor and trailer should be treated as one vehicle, for they, in reality, constitute one property-hauling unit.

It is true that for the purpose of motor vehicle licenses the tractor and trailer are treated as two vehicles. However, the motor vehicle license tax is based on the use of the highways of the State and not upon the size of the company owning the vehicles. Since the theory of the two taxes is entirely different, I do not believe that we should follow the Motor Vehicle Law in determining the amount of the Schedule "B" tax.

SALES AND USE TAXES; MERCHANTS RECEIVING GOODS FROM NON-RESIDENT
WHOLESALEERS; RETURNS, FAILURE TO MAKE

20 October 1947

You have requested my opinion on the following facts:

Keystone, The Reliable Company, of Memphis, Tennessee, sells many items of tangible personal property to persons within this state. These items of tangible personal property are sold at wholesale by Keystone and are purchased by individuals in this state for resale. The items are shipped to the purchasers in this state from Memphis, Tennessee. The purchasers of these items of tangible personal property are furnished by the Keystone Company with an "authorized agency certificate" which states that these purchasers are not liable for any state licenses for selling these items.

You inquire if these agents should collect the North Carolina sales tax on sales made by them and remit the same to the Department of Revenue.

Section 405 of the Revenue Act levies a tax on all retail merchants engaged in the business of selling tangible personal property in this state.

Obviously, if the Keystone Company sells items of tangible personal property to persons in this state and those persons then resell such items of property in this state, such persons are subject to the provisions of Section 405 of the Revenue Act. These persons should register with the Sales Tax Division of the Department of Revenue and should collect a 3% sales tax on their sales and remit the same to the Department of Revenue. The Sales Tax Article also requires returns to be made and the failure to make the returns is made a criminal offense by Section 422 of the Revenue Act. The penalty for failing to make the returns required by that section is a fine of not more than \$500.00 or imprisonment for not more than six months or both such fine and imprisonment.

If the Keystone Company does not sell items of tangible personal property to persons in this state for resale, but has agents located in this state and the sales are made through these agents to the ultimate consumer, then, the Keystone Company is required by our statute to collect the 3% use tax and remit the same to the State Department of Revenue. The state can constitutionally require the company to collect this tax and remit the same. This has been decided by the Supreme Court of the United States, *Nelson v. Montgomery Ward Company*, 312 U. S. 377, 85 L. ed. 899 (1940); *General Trading Company v. State Tax Commission*, 322 U. S. 335, 88 L. ed. 130 (1943).

If, however, as stated above, the Keystone Company only sells property for resale in this state, it would be under no duty to collect the use tax for such sales would be wholesale sales and the use tax would not apply thereto. In such a case the person selling the items in this state after purchasing them from the Keystone Company, would be liable for the 3% sales tax and should collect the same and remit it to the state.

INCOME TAXES; FOREIGN CORPORATIONS; UNITARY BUSINESS; LOSSES
SUSTAINED FROM BUSINESS NOT A PART OF UNITARY BUSINESS;
DEDUCTIONS; LIQUIDATING DIVIDENDS; TIME WHEN LOSS OCCURS

23 October 1947

You have requested my opinion on the following facts:

The American Agricultural Chemical Company (Delaware), hereinafter called taxpayer, is a foreign corporation engaged in the manufacture and sale of fertilizer and chemicals. It does a part of this business in North Carolina. Prior to 1900, taxpayer acquired lands and mines containing phosphate rock. These mines, located in Florida, were some distance from the docks of taxpayer where the phosphate rock was to be loaded on ships for transportation to taxpayer's plants. To transport this phosphate rock from mine to dock a railroad was needed. In 1897 a subsidiary of taxpayer, Alafia Manatee & Gulf Coast Railroad Company, was authorized to operate a railroad (common carrier) from the vicinity of taxpayer's mines to its docks. In order to acquire a right of way for this railroad, taxpayer was forced to purchase more land than was actually needed for the railroad line. In order to realize some gain from this land which was not needed for the railroad right of way, Boca Grande Corporation was organized in 1907.

Boca Grande Corporation, a wholly owned subsidiary of taxpayer, was capitalized at \$100,000.00. It is a foreign corporation and has never done any business in North Carolina. Boca Grande never operated the railroad (which in 1925 was sold to the S. A. L. R. R. Co.) and never engaged in the manufacture or sale of fertilizer or chemicals. It was organized solely to develop and sell real estate — a real estate company. Boca Grande acquired title to the excess lands purchased in acquiring the railroad right of way, improved it in many ways including the erecting of buildings, acquired additional lands, and sold parcels of land.

In order to carry on current operations and acquire additional land and improve the same, taxpayer, prior to 1921, advanced to Boca Grande \$1,161,575.00 and during this period there was repaid by Boca Grande \$46,599.43. From 1921 through 1945 other advancements were made to Boca Grande by taxpayer and during this same period Boca Grande repaid taxpayer \$83,131.38 more than was advanced during this period.

For these advances no evidences of indebtedness were acquired from Boca Grande by taxpayer and no interest was received.

In 1945 all of the assets of Boca Grande were sold and the proceeds thereof were taken by taxpayer. Since that time Boca Grande has not operated although its charter has not been cancelled. Taxpayer sustained a loss of \$1,031,844.23, and it claims that this loss was sustained in 1945 and claims a deduction therefor for that year.

Your inquiry is whether or not, in my opinion, this claimed deduction should be allowed.

The answer to your inquiry depends, in my opinion, upon whether or not the business carried on by Boca Grande constituted a part of an unitary business carried on by the taxpayer within and without this state. If it was a part of an unitary business carried on within and without this state by taxpayer the deduction should be allowed in computing the net income of taxpayer to which our allocation formula is to be applied. If it was not a part of such an unitary business, it should not be allowed in computing net income to which our allocation formula is to be applied. In so far as foreign corporations are concerned, our statutes recognize the right to claim deductions for losses incurred on account of business done outside of this state to the extent, and only to the extent, that the same business done outside of this state, if gains had resulted, could have been considered in computing the amount of our taxes. In other words, the deduction provisions of our income tax statutes reach only as far as the taxing provisions of such statutes. The boundaries of the two are conterminous.

It should be remembered that taxpayer conducted a business in Florida through its wholly owned subsidiary, Boca Grande. If taxpayer had made a profit from this business, could North Carolina have included this profit in the net income of taxpayer to which our allocation formula would be applied? North Carolina could do so only if the business done through Boca Grande helps to reflect the true earnings of the taxpayer in this state. In *Wallace v. Hines*, 253 U. S. 66 the following appears:

"The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system

to a mortal dart, — not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the (70) possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax, — whatever it may be, — whether a tax on property, or, as here, an excise upon doing business in the state."

There are many other cases to the effect that earnings or property outside of the taxing state can be considered only if those earnings or that property is a part of an unitary business carried on both within and without the taxing state. *Commonwealth v. Quaker Oats Company*, 350 Pa. 253, 38 A. 2d 325, 89 L. ed. 1395; *Commonwealth v. Ford Motor Company*, 350 Pa. 236, 38 A. 2d 329, 89 L. ed. 1394; *Maxwell v. Kent-Coffey Co.*, 204 N. C. 365, 78 L. ed. 1040; *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113, 65 L. ed. 165; *Bass, Ratcliff and Gretton v. State Tax Commission*, 266 U. S. 271, 69 L. ed. 282; *National Leather Company v. Mass.*, 277 U. S. 413, 72 L. ed. 935; *Hans Rees' Sons v. Maxwell*, 283 U. S. 123, 75 L. ed. 879; *Ford Motor Company v. Beauchamp*, 308 U. S. 331, 84 L. ed. 304; *Butler Brothers v. McColgan*, 315 U. S. 501, 86 L. ed. 991.

In an annotation appearing in 75 L. ed. 879, 900 the following appears:

"Where the business done within the state is distinctly divisible from business done in other jurisdictions by the same corporation, the total income from all operations cannot be used as a basis for computation."

In *Ford Motor Company v. Beauchamp*, *supra*, the following appears:

"In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."

It appears that there is absolutely no connection between taxpayer's fertilizer and chemical business and the real estate business of its wholly owned subsidiary. The only connection between the two is that taxpayer owns the stock of the subsidiary. This is not sufficient to make the business conducted by the two an unitary business. *Hans Rees' Sons v. Maxwell*, *supra*.

It would seem, therefore, that since the taxing provisions of our income tax statute do not extend to the business conducted by taxpayer through its wholly owned subsidiaries, the exemption provisions of the same statute would also be applicable. There is nothing in our income tax laws to indicate that our legislature intended to provide for the deduction of losses sustained in such a way and at such a place that the taxing provisions of our statutes would be inapplicable if said losses had been gains from the same transactions.

There is another basis on which, in my opinion, the claimed deduction should be disallowed. Section 319 of the Revenue Act provides that no gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation, if the corporation receiving such property was on the date of the adoption of the plan of liquidation and at all times since then the owner of at least 80% of the stock in the liquidating corporation.

The taxpayer contends that since the charter of Boca Grande has not been canceled there has been no liquidation of Boca Grande. This, in my opinion, is not controlling. In *Kennemer v. Commissioner*, (C. C. A. 5th, 1938) 96 F. 2d. 177, 21 AFTR 103 the following appears:

"It is not material that the distribution was not specifically designated as a liquidating dividend or that no formal resolution to liquidate or dissolve the corporation had been adopted when the distribution was made. An intention to liquidate was fairly implied from the sale of all the assets and the act of distributing the cash to the stockholders. Permitting the forfeiture of its right to do business was an additional circumstance which the Board properly considered with the other facts in evidence. The determining element was the intention to liquidate the business, coupled with the actual distribution of the cash to the stockholders."

In *Horn & Hardart Baking Company v. U. S.*, 34 F. Supp. 89, 35 AFTR 786 the following appears:

"Liquidation is generally deemed to be the operation of winding up the affairs of a corporation by realizing upon its assets, paying the liabilities, and appropriating the amount of its surplus or loss. There must be a manifest intention to liquidate and a continuing purpose to terminate the affairs and dissolve the corporation, and its activities must be directed and confined to that object. Liquidation cannot be brought about by a mere declaration and the question of whether a corporation is in liquidation is one of fact to be determined by the evidence of the corporations' activities. It is not a technical status which can be assumed or discarded at will by the adoption of a resolution, but it is an existing condition which is brought about by affirmative action, the normal and necessary result of which is the winding up of the corporation business. *W. E. Guild v. Commissioner*, 19 B. T. A. 1186. The adoption or failure to adopt a resolution of dissolution or liquidation is not controlling or determinative. *Kennemer v. Commissioner*, 35 B. T. A. 415; *Id.*, 5 Cir., 96 F. 2d 177. The fact that a resolution to dissolve has not been adopted at the time of distribution does not of itself prevent a distribution from constituting a liquidating dividend, the determining element being whether the distribution was made with the intent to maintain the corporation as a going concern or with the intent to liquidate the business."

Likewise it is my opinion that the advances made by taxpayer to Boca Grande were capital investments and not loans. It should be remembered that no interest was charged or paid and that no evidences of indebtedness were issued. In *Thomas J. O'Neill P-H 1947 Tax Court Memorandum Decisions*, paragraph 47,239 the following appears:

"The advances had none of the usual characteristics of commercial loans. This is conclusively shown by the fact that no evidence of indebtedness was issued; no interest was paid and there is no indication

in the record that any interest was ever credited in any manner to petitioner; and the advances were made over a period of many years as, and in the amount, needed, without any apparent regard for time of repayment or collectibility."

There is a question in my mind as to when the loss claimed by taxpayer occurred. In *Rickard v. Commissioner*, 15 B. T. A. 316, 318, the following appears:

"As to the deduction of \$14,407.50 on account of the investment in 1906 in United Ely Copper Co., we believe the record amply shows that this stock was worthless long before the taxable year 1921. There were no sales of the stock after 1907. No mining was done after 1909. Except for assessment work performed in order to maintain title the property lay idle for all the following years. Rickard held to this stock in the faint hope that some day it might prove valuable. The fact of a loss, however, is not to be determined solely by an attitude of mind. The ascertainment of worthlessness of property or investment is a practical matter to be gauged by practical business standards. The illusory hope of a speculator or a professional promoter that his investments, proven unprofitable for years past, may some day prove valuable is not sufficient basis to postpone from year to year the cold fact of actual worthlessness already reasonably established. Nor does the fact that in furtherance of such hope he may 'send good money after bad' and spends small sums periodically to keep the investment legally alive stay the operation of those economic laws which have brought about practical worthlessness."

I, therefore, advise that, in my opinion, the deduction claimed by the taxpayer should be disallowed.

SALES AND USE TAXES; PREFABRICATED HOUSES; MAXIMUM
TAX OF \$15.00 ON A SINGLE UNIT; ETC.

24 October 1947

You have requested my opinion on the following facts:

_____, Inc., a North Carolina corporation, (hereinafter called taxpayer), is engaged in this State in the business of selling "houses" which are erected from sections manufactured by a nonresident manufacturer. Taxpayer solicits orders for houses and when an order is received, taxpayer orders what it calls "a house" from the manufacturer. The manufacturer, by assembly-line methods, produces the component parts of houses, but no manufacturing is done until orders are received. When the manufacturer receives orders for houses, the material for each house is given a number and the parts manufactured from that material are used in that one house. The houses are ordered by number, and thus, all of a particular style are of the same size with the same appearance. This enables the manufacturer to use assembly-line methods in the manufacture of the houses.

The four walls of the manufactured houses are fitted together at the manufacturers plant to insure that they join properly. The flooring, the roof supports, and the roof are not attached to the four walls at the

manufacturer's plant. The four walls, with windows and screens installed, are then cut into sections for shipping. The "house" is shipped in many packages.

The manufacturer ships the parcels to the taxpayer c/o the purchaser at the purchaser's address. There, the various parts are joined and become a dwelling.

Your inquiry is whether the sale of these component parts constitutes the sale of a single unit to which the maximum tax of \$15.00 should be applied or whether there is a sale of many units.

I am of the opinion that there is no sale of a single article, but of many articles which are subsequently fitted together into a single building. Until the building is put together and becomes a building on the premises of the purchaser, there is no building, as such. Instead, there are many materials, sections, articles, or pieces, which, when appropriately used, can be made into one unit. But until that is done, the unit does not exist; it is merely in contemplation.

I cannot perceive any essential difference between the "sections" in this case and building materials in any other case as far as the "single article" question is concerned. Such sections are nothing more or less than a kind of building material. The fact that such materials have been "prefabricated" into a form which facilitates their ultimate use through elimination of much work in the erection of the building on the premises does not, in my opinion, influence the matter one way or the other. In a sense, all lumber, brick, and other building materials are "prefabricated." It seems to me that the only difference is that the taxpayer in this case has carried that process further.

Therefore, I think this case is analogous to many others which this office has heretofore considered. For instance, we have heretofore expressed the opinion that the component parts of a water tank, though prefabricated for erection into a unit without further fitting, are separately taxable; and that the prefabricated pieces of a staircase, though fitted, matched, and shipped together for installation as a unit, i.e., one staircase, are separately taxable. The staircase example is expressly included in the earliest regulation on this matter.

Taxpayer places much emphasis upon the fact that in ordering and selling the parts from which the houses are erected, it sells and orders only "houses" or "a House." Taxpayer says that it will not sell a portion or part of a house. This, however, is merely taxpayer's conclusion as to the legal effect of its method of doing business. The fact that taxpayer will sell only a specified number of parts (enough to erect a house) does not prevent the sale from being a sale of separate units. Taxpayer sells separate articles which may be joined together to form a house, but there is nothing which says the parts must be so joined. The delivery to the purchaser is a delivery of parts, not of a house, and the purchaser may use the parts as he sees fit.

I, therefore, advise that, in my opinion, the sale of these component parts does not constitute the sale of a single article, and, thus, the \$15.00 maximum tax provided for in paragraph (b) of Section 405 of the Revenue Act is inapplicable.

INCOME TAXES; FIDUCIARIES; NON-RESIDENT BENEFICIARY
OF RESIDENT TRUST

30 October 1947

You have requested my opinion on the following facts:

A trust is created with a North Carolina trust company as trustee and with nonresidents as beneficiaries. The only income received by the resident trustee is from dividends paid by foreign corporations on shares of stock held by the trustee. When the trust was created, the shares of stock were transferred to the trustee and the trustee merely holds the stock and collects the dividends. No part of the income received by the trustee during the income year is distributable to the nonresident beneficiaries. The corpus of the trust is composed entirely of shares of stock in foreign corporations.

You inquire if the receipt of these dividends by the trustee constitutes the receipt of income which is taxable to the trustee.

In so far as trusts are concerned, income which is distributable to the beneficiaries during the income year is taxable (if at all) to the beneficiaries, and income which is not distributable to the beneficiaries during the income year is taxable (if at all) to the trustee. Section 315 of the Revenue Act. Since we are concerned here only with income which is not distributable to the beneficiaries during the income year, this letter will deal only with the income tax liability of the trustee.

Section 315 of the Revenue Act imposes an income tax upon resident fiduciaries having in charge nondistributable "income earned in this state for the benefit of a nonresident." The dividends from foreign corporations received by the resident trustee for the benefit of nonresident beneficiaries are not distributable during the income year and if such income is "earned in this state" it is taxable to said trustee.

In speaking of income earned in this state, it seems to me that Section 315 means income earned in this state by the trustee and not income earned in this state by the corporation in which the trustee owns shares of stock. It is unnecessary, however, to decide this question for under either interpretation the answer to the present inquiry is the same.

If Section 315 means that the income must be earned in this state by the resident trustee, then it is my opinion that the dividends received in the manner outlined in this letter are not taxable to the trustee. The mere passive ownership of shares of stock and the receipt of dividends thereon does not, in my opinion, constitute an earning of the dividends by the holder of the legal title. *Pennsylvania Co. For Insurances, etc., v. City of Philadelphia*, 346 Pa. 406, 31 A. 2d 137 (1943); Cf. *Ross v. City of Philadelphia*, 25 A. 2d 834 (1942); Cf. *Dayton v. Ewart*, (Mont.; 1903) 72 Pac. 420; Cf. *Ray v. United Electric Rys. Co.* (R. I.; 1932) 159A. 637; Cf. *United Benefit, etc., v. Zwan* (Texas; 1940) 143 S W 2d 977, 980; *in re Lewis' Estate* (Pa.; 1893) 27A.35.

In Pennsylvania Co. For Insurances, etc., v. City of Philadelphia, supra, the following appears:

"As the Superior Court pointed out in *Ross v. Philadelphia et al.*, *supra*, the ordinance contemplates a tax only upon 'earned income.' This implies that some labor, management or supervision must be

involved in the production of that income. Income derived merely from the ownership of property would not satisfy the definition. It is therefore important to determine in the case of any property producing income to a trust estate whether the trustee, through agents or servants, is actively managing and supervising the operation of the property."

It should be noted that what has been said heretofore applies only to a trustee who merely holds shares of stock and collects the dividends paid thereon. It does not apply to a case in which the trustee manages or supervises property or is engaged as trustee in an investment business or otherwise exercises its powers for gain.

If Section 315 means that the income must be earned in this state by the corporation in which the trustee owns stock, then under the facts outlined in this letter, the dividends received by the resident trustee would not be taxable to said trustee. The corporation is a foreign corporation which does no business in this state and thus it cannot be said that it earned in this state the money from which the dividends were paid.

When first I started to prepare this opinion Section 311½ of this Revenue Act caused me some concern. However, I now believe that Section 311½ is of doubtful utility in the present Revenue Act.

It is, in my opinion, a section which was inadvertently included in the permanent Revenue Act. This is buttressed by the fact that the provisions of that section are also found in the other sections of the Revenue Act. See Sections 315, 317, 322(5), 327. Note the erroneous reference in Section 322(4) to Section 311½. This last reference had meaning only when Section 311½ levied a separate *gross* income tax on dividends on stock in foreign corporations. See Revenue Act of 1935, Section 311½.

In so far as the opinion expressed in this letter conflicts with the opinion expressed in a letter to you of December 19, 1946, that opinion is hereby overruled and withdrawn.

FRANCHISE TAXES; EXEMPTIONS; MUTUAL ORGANIZATIONS ORGANIZED
UNDER SUB-CHAPTER IV OF CHAPTER 54 G. S.; BARGAIN-WAYS
MUTUAL OF WAKE COUNTY

21 November 1947

You have requested me to advise you whether or not, in my opinion Bargainways Mutual of Wake County is exempted from the franchise tax article and the taxes levied thereby.

Bargainways Mutual of Wake County was incorporated under the provisions of sub-chapter IV of chapter 54 of the General Statutes. It was organized to act as buying agent for its stockholders with wide powers, among which are: The right to deal in real estate; the right to purchase, prepare, process, manufacture and distribute any and all kinds of food, household supplies, clothing, materials, farm supplies and equipment; and the right to hold and own stock in other corporations and control and vote the same as a natural person might do. The corporation is a non-profit corporation.

I am of the opinion that the corporation is subject to the provisions of the franchise tax article and should file reports required by said article and pay the tax levied thereby. There is no exemption for such corporations in sub-chapter IV of chapter 54 of the General Statutes and the exemption provisions of Section 213 of the Revenue Act are not broad enough to include this corporation.

The opinion expressed herein is in complete accord with the opinions heretofore expressed by this office. See opinion of 27th of July, 1939, to Honorable A. J. Maxwell, Attention Mr. T. W. Alexander.

INCOME TAXES; AMORTIZATION OF BOND PREMIUMS

15 December 1947

On November 28, 1944, in a letter to Honorable Gurney P. Hood, Commissioner of Banks, the following appears:

"6. Question—The bank has purchased U. S. Government Securities in the open market at a premium as follows: Certificates of Indebtedness maturing in 8 months, Bonds maturing in four years, Bonds maturing in seven years but callable in five years. Can the premium in purchase price be charged off at once or amortized during the life of the bond? Is the charge off, however allowed, made against undivided profits or against some other account?"

"Answer—Under regulations of the Department of Revenue the premium can be amortized during the life of a bond. The amount charged off is simply deducted from gross income in arriving at net taxable income."

On February 8, 1945, Prentice-Hall requested a copy of the regulations referred to in the above quoted statement. In reply to that request, Assistant Attorney General Adams, on February 12, 1945, wrote as follows:

"The regulations of the Department of Revenue referred to in the opinion of this office dated November 28, 1944, to Honorable Gurney P. Hood, Commissioner of Banks, are unwritten regulations and should more properly have been called a settled administrative practice. I regret that the terms used were misleading."

As Chief of the Income Tax Division, you advise that the settled administrative practice of the Department is, and has been, to disallow the amortization of bond premiums. You further advise that no taxpayer has attempted to amortize bond premiums until quite recently when a single taxpayer claimed the right to so deduct losses incurred. In view of the settled administrative interpretation, you request that I recall the opinions expressed by Assistant Attorney General Adams to Honorable Gurney P. Hood and the explanatory letter written to Prentice-Hall.

This is to advise that in my opinion, the Department should continue to follow the practice which it has heretofore adhered to; that is, the loss incurred when bonds are purchased at a premium should be allowed as a deduction at the time of the sale or conversion of the bonds and should not be amortized during the life of the bond.

AD VALOREM TAXATION; CERTIFICATION OF ASSESSMENTS BY STATE BOARD
OF ASSESSMENT; VALIDITY OF ASSESSMENT NOT MADE
WITHIN STATUTORY TIME

19 January 1948

I have your letter of January 16 enclosing a letter dated November 18, 1947, addressed to the North Carolina Department of Revenue, State Board of Assessment, from Mr. J. R. Davis, Cleveland County Attorney. It appears from Mr. Davis's letter that in May of 1935 the State Board of Assessment levied a corporate excess tax assessment in the sum of \$1126.28 against the Dover Mill and an assessment in the sum of \$208.98 against the Ora Mills, both Mills being owned by corporations and located in Cleveland County. The tax in each instance was for the year 1934. Mr. Davis states that the tax has never been paid and that the Mills refused to pay it on the ground that the tax levy was made in the year after the tax was due. It is true that the Machinery Act of 1933, Section 603(6), required the State Board of Assessment to certify the corporate valuation on or before the first day of August of each year, and in the cases presented by Mr. Davis this certification should have been made on or before August 1, 1934. Mr. Davis asks why the levy was not made until May of 1935 and also whether there is any reason why the tax should not be paid.

I, of course, do not know why this certification was delayed until May of 1935. I am of the opinion, however, that the tax levied upon the certification of corporate valuation by the State Board of Assessment is valid and collectible. Section 8020 of the Consolidated Statutes of 1919 provided:

"Irregularities immaterial. No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement of law, shall invalidate the sale of any real estate when sold by the sheriff for delinquent taxes, nor in any manner invalidate the tax levied on any property or charged against any person."

Section 8021 of the Consolidated Statutes of 1919 provided in part:

"Irregularities defined. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, up to and including the execution and delivery of the deed for property sold for taxes, shall be taken and deemed to be mere irregularities within the meaning of the next preceding section: * * * the failure to assess any property for taxes or to levy any tax within the time provided by law; any irregularity, informality, or omission in any such assessment or levy; * * *."

These same provisions were found in the corresponding sections of the Consolidated Statutes of 1931 and these provisions continued unchanged in the Code until the adoption of the Machinery Act of 1939, by Chapter 310 of the Public Laws of 1939. The same provisions will be found in Subsection (j) of Section 1715 of the Machinery Act of 1939, as amended. It, therefore, appears that these provisions were a part of the law controlling

ad valorem taxation at the time the assessments and tax levies in question were made and that the fact that the assessment was not made until May of 1935 would be deemed under the law an immaterial irregularity and would not have the effect of invalidating the tax levies in question. Unless there is some local law to the contrary, which has not come to my attention the taxes in question are not barred by any statute of limitations; but I call your attention to the fact that remedies for the collection of the tax will become barred after December 31 of 1948 by virtue of Chapter 1065 of the Session Laws of 1947 unless proceedings are instituted prior to that date.

INHERITANCE TAXES; TRUSTS; RESERVATION OF INCOME FOR LIFE OF TRUSTOR;
CREATION OF TRUST BY NON-RESIDENT WITH RESERVATION OF INCOME
FOR LIFE OF TRUSTOR WHO LATER BECOMES A RESIDENT
OF THIS STATE AND DIES HERE

26 January 1948

You have referred to me a letter from Honorable W. C. Meekins of the law firm of Smathers and Meekins of Asheville, North Carolina, and requested my opinion as to whether or not the corpus of the trust discussed in that letter is includible in the gross estate of the trustor for North Carolina inheritance tax purposes.

It appears that the trustor was a resident of Pennsylvania at the time of the creation of the trust. The corpus of the trust is composed of shares of stock in corporations created under the laws of states other than North Carolina. Said shares of stock were irrevocably transferred to a Pennsylvania trustee by the trustor who reserved to himself the income from the stock during and for the term of his natural life. After the creation of the trust the trustor and his wife moved to North Carolina and became residents and domiciliaries of this state. The trustor died testate in this state and thus the question arises as to whether or not the corpus of the trust should be included in the gross estate of the trustor for inheritance tax purposes in this state.

Section 1 of the Revenue Act imposes a tax upon the transfer of any property, in trust or otherwise, to persons or corporations in the instances enumerated in that section. Paragraph third of that section reads in part as follows:

"When the transfer of property made by a resident or nonresident, is of real property within the State, or of goods, wares and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferee has retained for his life or any period not ending before his death, (a) the possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom."

Unquestionably this section would make the corpus of the trust includible in the gross estate of the trustor for inheritance tax purposes in this state if the trustor had been a resident of this state at the time of the creation of the trust and at the time of his death. (See the proviso at the end of Section 1 of the Revenue Act). Under the proper interpretation of the inheritance tax article of the Revenue Act, it is my opinion that the corpus of the trust is taxable in North Carolina and the fact that the *inter vivos* transfer took place in Pennsylvania is immaterial.

The North Carolina succession tax is an inheritance tax and not an estate tax. It is a tax levied upon the transfer from the dead to the living of the enjoyment of property as well as the legal title to property. Thus, where there has been an *inter vivos* transfer of the legal title to property with a postponement until the death of the grantor of the enjoyment of the property, paragraph third of Section 1 of the Revenue Act levies a tax on the enjoyment or possession of the property. This enjoyment or possession becomes effective in a case like the one under consideration only at the death of the transferor. This transfer of enjoyment or possession is the taxable event. In *Trust Co. v. Maxwell*, 221 N. C. 528, 20 S.E. 2d 840 (1942), Mr. Justice Barnhill says:

"Taxes of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. *Knowlton v. Moore*, 178 U. S., 41, 44 L. ed. 969; *Hagood v. Doughton*, *supra*. It is well settled that an inheritance tax is an excise tax upon the privilege of receiving property from a decedent by reason of his death."

In construing a statute quite similar to the provisions of our Revenue Act and discussing the question of what constitutes the taxable event for inheritance tax purposes, in a case like the one under consideration the Conn. Court used the following language in *Blodgett v. Trust Co.*, (Conn.; 1932), 158 A. 245, 248.

"The transaction was within the description of the statute. The property passed from the decedent to the beneficiary 'by deed, grant or gift.' Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, vested in interest in the beneficiary, she was not entitled to 'possession or enjoyment' of the fund or any part of it until the death of the decedent. * * * Her present right to the future 'possession or enjoyment' of the trust fund, which was 'vested' in the sense of being assignable and transmissible by her during the life of the decedent * * * was not 'possession or enjoyment,' within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest. * * * Apparently the Legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property — the 'economic benefits' thereof or 'economic interest' therein (compare *Saltonstall v. Saltonstall*, 276 U. S. 260, 271, 48 S. Ct. 225, 72 L. ed. 565; *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 346, 49 S. Ct. 123, 73 L. ed. 410, 66 A. L. R. 397) — from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title *inter vivos*. As was said in *State Street Trust Co. v. Treasurer & Receiver General*, 209 Mass. 373, 379, 95 N. E. 851, 852, 'The policy of the law is, that the owner of property shall not

defeat or evade the tax by any form of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted.' Worcester County National Bank v. Commissioner of Corporations and Taxation, *supra*."

This case was affirmed on appeal to the Supreme Court of the United States, *Trust Company v. Blodgett*, 285 U. S. 509, 77 L. ed. 463.

Since the trustor was a resident of North Carolina at the time of his death the rights which the beneficiaries of the trust received because of his death are, in my opinion, taxable under paragraph third of Section 1 of the Revenue Act. The fact that North Carolina had no jurisdiction to levy a tax at the time of the *inter vivos* transfer, is immaterial because North Carolina is not attempting to tax that transfer. The transfer which North Carolina is taxing in this case is the transfer of the possession or enjoyment of property from a decedent to a living person. A liberal interpretation of the inheritance tax statutes would certainly make the transfer of the enjoyment of the property under consideration a taxable event in North Carolina and the inheritance tax statutes are to be liberally construed to the end that all property fairly and reasonably coming within their provisions may be taxed. *Reynolds v. Reynolds* 208, N. C. 578, 182 S. E. 341 (1935); *State v. Scales*, 172 N. C. 915, 90 S. E. 439 (1916); *Norris v. Durfey*, 168 N. C. 321, 84 S. E. 687 (1915).

The interpretation herein made of the provisions of the inheritance tax statutes is the interpretation which the department has long adhered to. This administrative interpretation is entitled to great weight. *Cannon v. Maxwell*, 205 N. C. 420, 171 S. E. 624 (1933); *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326 (1936); *Valentine v. Gill*, 223 N. C. 396, 27 S. E. 2d a (1943).

I am familiar with the federal cases such as *Keeney v. Comptroller*, 222 U. S. 525, 56 L. ed. 299 and *Helvering v. Hallock*, 309 U. S. 106, 54 L. ed. 604, which hold that for federal estate tax purposes the taxable event in a case like the one under consideration is the *inter vivos* transfer. The distinction between the federal cases and the present interpretation of the North Carolina Revenue Act is that the federal tax is an estate tax, i.e. a tax on the estate of the decedent because of the transfer of his estate, while the North Carolina tax is a tax on the right to receive property.

I therefore advise that, in my opinion, the entire corpus of the trust is taxable for inheritance tax purposes in North Carolina.

SALES TAXES; EXEMPTIONS; SALES TO FLEET OWNERS; MOTOR VEHICLE
PARTS AND ACCESSORIES; TARPULINS

31 January 1948

Recently one of the auditors of the Department of Revenue made an audit of the books of a tent and awning company. This audit disclosed that the company had sold many tarpaulins to owners and operators of fleets of motor vehicles, had classified the tarpaulins as automobile accessories, and had classified the sales thereof as being subject only to the wholesale rate of taxation under the Sales Tax Article. You inquire if, in my opinion, tarpaulins should be classed as automobile accessories when sold to "fleet owners" and therefore subject only to the wholesale rate of taxation under said article.

Subsection (t) of Section 406 of the Revenue Act reads as follows:

"Sales of lubricants, repair parts and accessories for motor vehicles and airplanes, when made to the owner and operator of fleets of five or more motor vehicles or airplanes, to be used in or upon such motor vehicles or airplanes, shall be classified as wholesale sales, and, therefore, only subject to the wholesale rate of tax.

The statutes do not contain any definition of "accessories"; therefore, we must search the authorities for judicial definitions of the term. The only definitions which I have found are in the Federal cases construing the term "accessories" as it appears in the Federal law levying an excise tax on automobiles, automobile parts and accessories. In determining whether the articles under consideration in the Federal cases were accessories, the taxing statute was construed strictly; that is, the articles were not to be taxed unless they clearly fell within the terms of the taxing statute. *Philadelphia Storage Battery Co. v. Lederer*, 21 F. 2d 320 (1927). In determining whether the sales of tarpaulins to "fleet owners" are exempt from the retail sales tax, the exemption statute is to be construed strictly; that is, sales of tarpaulins to "fleet owners" are not exempt from the retail sales tax unless they clearly fall within the terms of the exemption statute. *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6 (1936). Thus, the question to be decided here, like the question decided in the Federal cases, is whether a certain article is an automobile accessory as that term is used in a statute which is to be construed strictly.

In discussing automobile accessories in *Universal Battery Co. v. U. S.*, 281 U. S. 580, 74 L. ed. 1051 (1929), the United States Supreme Court used the following language:

"Certainly, it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is used in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that *articles primarily adapted* for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted." (Italic added).

Illustrative of the above rule are the cases of *Masterbuilt Products Corp. v. U. S.*, 42 F. Supp. 294 (1942) and *Cuno Engineering Corp. v. U. S.*, 43 F. 2d 259 (1930). In the *Masterbuilt* case, *supra*, it was held that cigarette case and lighter combinations designed and advertised as automobile safety devices and which would not operate under ordinary house current were automobile accessories. The Court said:

"The findings show that the device sold was primarily adapted for use in motor vehicles; that it was so intended to be used, and that it was advertised as a safety device in the operation of automobiles which enabled the operator of a car to obtain a lighted cigarette without taking his eyes from the road.

"The evidence shows that the device could be made to work when attached to a table, desk, or ash receiver but it could not be so operated under the ordinary house current and no suggestion is made as to how any advantage could be gained except when used in connection with an automobile."

In the *Cuno* case, *supra*, cigarette lighters and ash trays adapted for use in many places, including automobiles, were held not to be automobile accessories. There the Court said:

"The installation of a cigar lighter and ash receiver is manifestly a convenience to smokers occupying an automobile. It may or may not add to the ornamentation of a car. This is a matter of taste. The defendant asserts that 'Congress meant to tax articles used on or in connection with automobiles.' If so, the taxing statute has not been so construed by the Commissioner or the courts. *Auburn Rubber Co. v. United States*, 67 Ct. Cl. 49; *Wells Mfg. Co. v. United States*, 66 Ct. Cl. 283; *Milwaukee Motor Products Co. v. United States*, 66 Ct. Cl. 295. The Commissioner has not taxed flower holders, ash receivers, cardcases, toilet cases, vanity cases, baby cribs, or hammocks. Obviously a clear distinction prevails, and was within the intent of the Revenue Act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safety operation and functioning elements that it becomes a component part of the machine's utility. The segregation essential to make depends upon the facts of each case. We have held so more than once. *Edison Storage Battery Company v. U. S.*, 67 Ct. Cl. 543 decided May 6, 1929; *Cracker Jack Co. v. U. S.*, 67 Ct. Cl. 89, decided February 4, 1929. Aside from the general commercial value of the devices here involved, it is difficult to see how they in any wise prolong the life of a car, aid in its operation, or function to overcome any of the various difficulties attendant upon the car's operation, or the incidental inconveniences of automobile travel. A box of safety or loose matches, a separate automatic cigar lighter and ash receiver, clearly constitute a substitute for the devices involved. The electric lighter takes the place of all these, and does no more than serve a personal convenience to the occupant of the car who desires and seeks its use. We think the devices are to be classified alongside flower holders, cardcases, etc., heretofore mentioned."

In *Dalton & Balch v. U. S.*, 8 F. Supp. 727 (1934), it was held that gears designed primarily for use in automobiles were automobile accessories while gears which were equally adapted to a variety of uses and commonly put to such uses, including use in motor vehicles, were not automobile accessories. There the Court said:

"The test is the primary adaptability of the article sought to be taxed for use in motor vehicles. If it is primarily adapted for such use, it is to be regarded as a part or accessory for an automobile even though there are other uses of the article for which it is not so well adapted. On the other hand, an article equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, cannot be so classified."

In *American Chain Co. v. Trust Co.*, 11 F. Supp. 770 (1931), tire chains were held not to be automobile accessories because they could be used equally well on all vehicles having wheels and not just on automobiles.

In deciding that a special transmission designed to be used in connection with automobiles but not as a part thereof was not an automobile accessory, the Court in *Ekstrom v. U. S.*, 21 F. Supp. 338 (1937), said:

"It seems to have been considered by the Commissioner of Internal Revenue and argued on behalf of defendant that because the Jumbo transmission was primarily designed and adapted for use in connection with the Ford Motel T engine and was in fact used in some instances as a part of a car or truck, it follows that the transmission was an automobile part and taxable as such. That this is not enough is apparent on reading the regulation; see, also *Milwaukee Motor Products, Inc. v. United States*, 66 Ct. Cl. 295, 302. In order to make the part taxable it must, under the regulations, be designed for the special purpose of being used as, or to replace, a component part of a self-moving vehicle and be such an article as would not ordinarily be sold for general use, but be primarily adapted for use as a component part of such vehicle."

In *Crawford v. U. S.*, 50 F. 2d 280 (1931), the Court held that a manufacturer of automobile top covers, automobile back curtains, wedge-shaped cushions and automobile seat and floor coverings was not liable for the excise tax on the wedge-shaped cushions since they were not primarily adapted for use in motor vehicles but could be used in other things, such as boats and swings.

See also *Niagra Motors Corp. v. McGowan*, 45 F. Supp. 346 (1942); *Marvel Products Co. v. U. S.*, 35 F. 2d 979 (1929); *Philadelphia Storage Battery Co. v. Lederer*, 21 F. 2d 320 (1927).

From telephone calls to various deputies, it appears that tarpaulins are sold generally by tent and awning dealers and that those dealers have been collecting the retail sales tax on all tarpaulins sold. It also appears that tarpaulins are not primarily adapted for use in motor vehicles but may be used and are designed to be used for myriad purposes. Webster defines "tarpaulin" as follows: "Canvas covered with tar, paint, or other water proof composition, esp. when in a large sheet and used for covering the hatches of a ship, hammocks, boats, etc." (*Italic added*).

I therefore advise that, in my opinion, tarpaulins sold to "fleet owners" are not exempt from the retail sales tax by subsection (t) of Section 406 of the Revenue Act.

INHERITANCE TAXES; DOWER; ANTE-NUPTIAL AGREEMENT TO TAKE
PROPERTY IN LIEU OF DOWER; TAXABILITY

17 February 1948

You have submitted to me a copy of an antenuptial agreement entered into between E. L. Baxter Davidson and Sarah W. Vosburgh and requested my opinion as to whether the property mentioned in that agreement should be included in the estate of E. L. Baxter Davidson for North Carolina Inheritance Tax purposes. Both parties to the agreement were residents of North Carolina at the time of the execution of the agreement and at the

time of the death of E. L. Baxter Davidson. The pertinent provisions of the agreement read as follows:

"1. Said E. L. Baxter Davidson, in consideration of the promise of said Sarah W. Vosburgh to marry him, and of the consumation of said promised marriage and of her agreements herein contained, covenants and agrees that he will upon his decease pay, cause to be paid, or provide that there shall be paid, to her, the sum of \$30,000.00 in State of North Carolina Bonds or U. S. Government Bonds, whichever will yield her the better income, said sum to be based upon the par value of said bonds, together with accumulated interest upon said bonds from the date of the marriage of the parties to this agreement.

"2. And said Sarah W. Vosburg, in consideration that said contemplated marriage be consumated, and of the covenants of the said E. L. Baxter Davidson hereinbefore contained, does covenant and agree to and with said E. L. Baxter Davidson his executors, administrators and heirs, that she will, upon the death of said E. L. Baxter Davidson, take and receive said \$30,000.00 in Bonds of the State of North Carolina, at par, or U. S. Government Bonds, at par, with accumulated interest on said bonds from the date of the consumation of the contemplated marriage, as set forth in Paragraph 1 above, in full of all rights of dower in or to his estate and in full of all other rights, interests, claims, or allowances in law or in equity in to or upon his estate, real and personal, which she might or could have or be entitled to but for this agreement.

"3. And said E. L. Baxter Davidson, in consideration of the consumation of said contemplated marriage, and in consideration of the covenants hereinbefore contained, does covenant and agree to and with said Sarah W. Vosburgh, her executors, administrators and heirs, that he will and does release quiteclaim and discharge every and all rights, claims and interest he may have or acquire in the separate estate of said Sarah W. Vosburgh, whether real or personal, and also in any estate which she may hereafter acquire, whether real or personal."

In my opinion the amount mentioned in the agreement should be included in the estate of E. L. Baxter Davidson for North Carolina Inheritance Tax purposes. In 28 *Am. Jur., Inheritance, Estate, and Gift Taxes*, Sec. 128, the following appears:

"It has been held that money paid by virtue of an ante-nuptial contract by which the wife agreed to take a specified sum upon her husband's death in lieu of dower and all other rights against his estate is not subject to the inheritance tax, since it is paid to satisfy a debt and not an inheritance. *But the states in which dower itself is taxable take a contrary view.*" (Italics added). See, also, 28 *Am. Jur., Inheritance, Estate, and Gift Taxes*, Sec. 171.

The last sentence of the above quoted provision would seem to be applicable to antenuptial agreements in North Carolina in view of the fact that dower itself is taxable in this state. *Corporation Commission v. Dunn*, 174 N. C. 679, 94 S. E. 481 (1917).

In 28 *Am. Jur., Inheritance, Estate, and Gift Taxes*, Sec. 158, the following appears:

"However, there is authority to the effect that a sum paid a widow, pursuant to an agreement, in lieu of rights she might otherwise have as a widow is taxable for the reason that dower is taxed, or the transfer may be taxed under the provision relating to transfers effective in enjoyment at or after death."

Section 1 of the Revenue Act contains a provision taxing transfers intended to take effect in possession or enjoyment at or after the death of the transferor.

In 28 *Am. Jur.*, *Inheritance, Estate, and Gift Taxes*, Sec. 189, the following appears:

"It has likewise been held that the doctrine that release or relinquishment of dower or other marital rights of the wife in the husband's estate may constitute a valuable consideration for a contract is not applicable against the state as regards inheritance tax imposed by the state, which has power to tax her succession." (Italics added).

I therefore advise that, in my opinion, the property mentioned in the antenuptial agreement should be included in the estate of E. L. Baxter Davidson for North Carolina Inheritance Tax purposes.

EXCISE TAXES; BEER CROWN TAX; REFUND; LOSS OCCASIONED BY
DEFECTIVE CONTAINERS

20 February 1948

You have requested my opinion as to whether a refund of beer crown taxes levied under Section 517 of the current Revenue Act is authorized under the following statement of facts:

The G. Krueger Brewing Company has shipped into this State 2,000 cases of beer, in cans, to which tax-paid crowns have been duly affixed. This beer has either spoiled or is in danger of spoilage due to the fact that the wax interlining of the cans was defective so that the Brewing Company is recalling the 2,000 cases of beer for destruction.

Subsection (e) of Section 517 of the Revenue Act provides in part:

"The crowns and lids shall be sold by the Commissioner of Revenue at a discount of two per cent (2%) as sole compensation for North Carolina tax-paid crown and lid losses sustained in the process of production of malt beverages. No compensation or refund shall be made for tax-paid malt beverages given as free goods, or advertising, and losses, sustained by spoilage and breakage incident to the sale and distribution of malt beverages."

I am of the opinion that the crown loss in the instant case was "sustained in the process of production," and as such is the loss compensated by the 2% discount granted the manufacturer under the section. It follows that no refund can be made to the Brewing Company under the statement of facts set out above.

This opinion is in keeping with previous constructions of this section by this office. Under date of October 14, 1942, this office ruled that the 2% discount covered a loss which occurred in the transportation of the beverages by railroad; under date of November 30, 1945, it ruled that the 2% discount covered losses sustained by bottle crowns or lids being lost in transit by common carrier between the place of manufacture of the crowns and the brewery or bottler; and on December 17, 1945, it ruled that the 2%

discount covered a loss sustained by reason of the beer being seized under the Pure Food and Drug Laws. In none of these cases was a refund authorized. I am of the opinion that the instant case falls squarely within the language of the statute as quoted above and that the allowance of refund in this case would be contrary to the previously expressed opinions of this office, both oral and written, and would be contrary to the settled administrative interpretation of the statute.

FRANCHISE TAXES; INCOME TAXES; EXEMPTIONS; TAR
HEEL MOTORCYCLE CLUB

27 February 1948

You have requested me to advise you whether, in my opinion, the Tar Heel Motorcycle Club, Inc., is exempt from franchise and income taxes. According to the certificate of incorporation, the Club is a non-stock corporation organized for the following objects:

"(a) To promote interest in motorcycle riding for pleasure and recreation.

(b) To conduct, arrange, handle and supervise motorcycle, bicycle, automobile, and other forms of races and competitive riding and to offer and grant or contribute toward the provision of prizes, awards, and distinctions.

(c) To provide and conduct a clubhouse for the members of this corporation and to provide dressing rooms, shower baths, and to operate cold drink stands, sell cold drinks, ice cream, liquid drinks and all kinds of tobacco, cigarettes, candies, etc., and to provide any and all other conveniences for the guests and customers of the corporation, and in order to properly promote the objects and purposes of this corporation the corporation shall have full power to acquire, purchase, lease or otherwise handle, buy, sell, convey, mortgage or otherwise encumber real estate and other property, personal and mixed, to survey, subdivide, plat and develop lands, to build, improve and repair race tracks for the purpose of conducting motorcycle, bicycle, automobile or other forms of racing with power to purchase or lease, and operate all necessary machinery and equipment of all kinds, both in this State and all other States of the United States.

"(4) The corporation is to have and issue no capital stock and it is not organized for the purpose of profits to the members. Neither the corporation nor the members of this corporation shall be individually or personally liable for its debts, defaults or obligations."

I am of the opinion that the Club is not a corporation organized and operated exclusively for pleasure, recreation, and other non-profitable purposes within the meaning of Section 213 and Section 314 of the Revenue Act. It is true that the charter states that the Club is "not organized for the purpose of profits to the members." It appears, however, that the corporation is organized for the purpose of conducting races, awarding prizes, selling drinks, tobaccos, etc., and operating a clubhouse with dressing rooms and shower baths. The Club also has authority to acquire, deal in, and dispose of real and personal property.

Exemptions from taxation are construed strictly and the burden rests upon him who claims the exemption to show that he falls clearly within the terms thereof. *BENSON v. JOHNSON COUNTY*, 209 N. C. 751, 185

S. E. 6 (1936). When a corporation is organized for a purpose which makes it exempt from taxation under the statutes cited above, it cannot retain that exempt status and regularly engage in a business even though no part of the earnings is distributed to the individual member or stockholders. *JOCKEY CLUB v. HELVERING*, 76 F. (2d) 597, 15 AFTR 1196; *WESTSIDE TENNIS CLUB*, 39 BTA 149; Cum. Bul., December, 1934, Page 148.

In *JOCKEY CLUB v. HELVERING*, *supra*, the following appears:

"This does not of course mean that a club may on no occasion make a profit without losing its exemption, but it does mean that the returns from transactions with outsiders, taken by and large, shall be no more than a reimbursement of their cost to the club; shall not be a source of income. If it turns out upon computation that they are such a source over a substantial enough period to justify the conclusion that this is deliberate, we agree with the Board that the club is making earnings which 'inure to the benefit' of the members, though they are not distributed."

It appears from the charter that the main object for which the Club was organized was to conduct motorcycle and automobile racing. The charter contains no provision which indicates that these exhibitions are to be given free of charge. It appears, therefore, that a great deal of the corporation's income will be received from charges made for admission to the races. In Cum. Bul., December, 1934, Page 150, the following appears in a discussion of whether a club conducting tournaments was exempt from income taxation:

"Approximately three-fourths of the income of the M Association for the year 1932 arose from sources other than dues and membership fees. Ordinarily the receipt of substantial income from activities of such an organization negatives its right to exemption."

I, therefore, advise that, in my opinion, the Club about which you inquire is not exempt from franchise taxes under Section 213 of the Revenue Act nor from income taxes under Section 314.

FRANCHISE AND INCOME TAXATION; EXEMPTIONS; TRAILWOOD
MUTUAL GROCERY, INC.

Dear Mr. Gill:

16 March 1948

I have before me a letter from Mr. J. C. Bethune asking whether or not, in my opinion, Trailwood Mutual Grocery, Inc., of Raleigh, North Carolina, is exempted from franchise and income taxes. Enclosed with the letter is a copy of the articles of the incorporation of the subject company.

The articles of incorporation recite that the company is organized under Articles 16, 17, and 18, Subchapter IV of Chapter 54 of the General Statutes entitled "Cooperative Associations." According to the third article, Paragraph (a), the principal purpose for which the company is formed is "to carry on any lawful general mercantile business on the mutual plan."

It is my understanding that this company carries on a general grocery business and that sales are not limited to members only but are made to anyone who offers their patronage.

I find no statute exempting such corporations, organized under Subchapter IV of Chapter 54 of the General Statutes, from the payment of franchise taxes, neither in the subchapter of the General Statutes under which the corporation is organized nor in the franchise tax article of the Revenue Act. With respect to the income tax, the income tax article, Section 314, Paragraph 9, grants an exemption to:

"Mutual associations formed under General Statutes, section 54-124, *et seq.* (Chapter one hundred forty-four Public Laws of one thousand nine hundred fifteen and amendments), *formed to conduct agricultural business on the mutual plan*; or to marketing associations organized under Sub-chapter five, Chapter 54 of the General Statutes, Article 19, Section 54-129, *et seq.*" (Italics mine.)

Corporations organized under Subchapter IV of Chapter 54 of the General Statutes are authorized "to conduct any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan." The subject corporation was not formed to conduct, and it is not conducted, as an agricultural business, but rather was formed to conduct, and is conducting, a mercantile business. I am, therefore, of the opinion that the corporation is not within the exemption granted by Section 314, Paragraph 9, of the Revenue Act.

FRANCHISE AND INCOME TAXATION; EXEMPTION; LAKEWOOD CLUB, INC.

19 March 1948

I have your letter of January 21 to which is attached a copy of the certificate of incorporation, the amended certificate of incorporation, and the bylaws of Lakewood Club, Incorporated, of Asheboro, Randolph County. You ask my opinion as to whether this corporation is exempt from franchise taxes under Section 213 of the Revenue Act and also whether it is exempt from income taxes.

I have examined the amended certificate of incorporation and the bylaws of the corporation, and I am of the opinion that under the present charter and bylaws, the corporation is exempt from franchise taxes under Section 213 of the Revenue Act as a club "organized and operated exclusively for pleasure, recreation, and other non-profitable purposes," no part of the net earnings of which inures to the benefit of any private stockholder, individual, or other corporation. I am further of the opinion that the corporation as presently organized is exempt from income taxes under Section 314, Subsection 6, of the Revenue Act which exempts "clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member."

FRANCHISE TAXES; INCOME TAXES; EXEMPTIONS; BUSINESS LEAGUES;
AGRICULTURAL ASSOCIATIONS

20 March 1948

You have referred to me the certificate of incorporation of Agricultural Development Company, Inc., and requested that I advise you whether it is exempt from franchise and income taxes.

The company is a non-stock corporation organized as a non-profit educational and charitable company. Its certificate of incorporation discloses that it was organized for the following purposes:

"(a) For the purpose of fostering and encouraging the agricultural and industrial development of Henderson County and Western North Carolina.

"(b) To aid, so far as a corporation can, in the institution and promotion of research in scientific investigations of all branches of agriculture and animal husbandry.

"(c) To encourage by dissemination of literature and otherwise a more scientific development of agriculture and animal husbandry throughout Western North Carolina.

"(d) To acquire title to approximately 60 acres of land and the improvements thereon, owned by Henderson County, upon which is now located the Western North Carolina Agricultural and Industrial Fair Association, Inc.; and to improve and develop said property to the end that it may be available for agricultural and industrial fairs, cattle, livestock and fowl exhibits and other allied events.

"(e) And, in connection with the purposes above set forth and in order to carry them out, to receive and acquire by gift or otherwise, and to hold real and personal property, to lease, and sell its holdings, to make investment of its funds, to borrow money, secured by mortgage on its property or otherwise, to accept gifts and bequests and to apply the principal or interest as may be directed by the donor, or as the Board of Directors of the corporation may determine in the absence of such direction, and finally to take such steps as said Board of Directors deems requisite to carry out its general purposes and as are permitted by law to corporations of a similar class and to have all other powers with which such corporations are endowed."

I am of the opinion that the company is not exempt from franchise and income taxes as a charitable corporation, but that it is exempt from said taxes as a business league. The exemption of business leagues from the franchise tax is found in Section 213 of the Revenue Act, and a like exemption is found in Section 314 (4) of the Revenue Act, a part of the income tax article.

A corporation almost identical to the one under consideration was held exempt from Federal income taxes as a business league in *C B 1938—2*, p. 163. Cf. *WASHINGTON STATE APPLES, INC., v. COMMISSIONER*, 46 BTA 64 (1942); *ASSOCIATED INDUSTRIES OF CLEVELAND v. COMMISSIONER*, 7 T. C. 1449 (1946); *RETAIL CREDIT ASSOCIATION, ETC., v. U. S.*, 30 F. Supp. 855, 24 AFTR 329 (1938); *AMERICAN FISHERMEN'S, ETC., v. U. S.*, 51 F. Supp. 933, 31 AFTR 726 (1943); *P-H Federal Tax Service* 1948, Para. 4384.

I therefore advise that the corporation under consideration is exempt from North Carolina franchise and income taxes.

INTANGIBLE TAXES; SECTION 703; ACCOUNTS RECEIVABLE; DEDUCTIONS;
EVIDENCES OF DEBT

30 March 1948

You have handed me a sample copy of a deposit receipt issued by Duke Power Company and have asked me whether, in my opinion, the indebtedness owing by Duke Power Company to various customers evidenced by such deposit receipts are classifiable as accounts payable and thus deductible from accounts receivable under Section 703 of the Revenue Act. These deposit receipts are issued by the power company to customers who are required to make a deposit to guarantee payment of charges. The funds so deposited by the customers may be claimed by the customers upon termination or discontinuance of service subject to the payment of any outstanding indebtedness owing by the customers to the power company.

Section 703 of the Revenue Act contains this provision:

"Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer."

Section 704 of the Revenue Act provides, in part:

"All bonds, notes, demands, claims, and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December thirty-first of each year shall be subject to annual tax, which is hereby levied of twenty-five cents (25c) on every one hundred dollars (\$100.00) of the actual value thereof: Provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year."

I am of the opinion that the deposit receipts in the hands of the customers of Duke Power Company representing deposits made by the customers, are not properly classifiable as accounts payable by Duke Power Company but rather are evidences of debt. The amounts represented by such deposit receipts are, therefore, not deductible from accounts receivable owing to Duke Power Company but rather would be deducted from the value of all taxable bonds, notes, demands, claims and "other evidences of debt however evidenced," under Section 704. In 1 C. J. S., page 573, accounts payable is defined as, "a contract obligation owing by a person on open account" and accounts receivable as defined as "the amount owing to a person on open account." Both definitions are supported by Bouvier's Law Dictionary and by cited cases.

On page 574 of 1 C. J. S., I find the following:

"Open Account. An open account is one in which some item of contract is not settled by the parties, or where there have been running or current dealings between the parties and the account is kept open with the expectation of further dealings. In other words, it is an unsettled debt arising from items of work and labor, goods sold and de-

livered, and other open transactions not reduced to writing, and subject to future settlement and adjustment. However, all accounts which are not stated or reduced to writing are not necessarily open accounts; and an account, although not reduced to writing or stated, cannot be said to be open where it is based on a contract whose terms are fixed and certain. Nor does an admission of indebtedness in a precise sum, or a claim for money paid on the request of another, constitute an open account."

ISSUANCE OF STATE RETAIL BEER LICENSE; ISSUANCE OF LOCAL
LICENSE AS PREREQUISITE

11 May 1948

I have before me a letter from Ace Distributing Company by Mr. William E. Griffin addressed to you under date of May 3, 1948, in which Mr. Griffin suggests that a proper interpretation of the Beverage Control Act of 1939 requires that a State license for the retail sale of beer be not issued until the applicant has first applied for and obtained his city and county or county license, as the case may be.

I do not concur in the opinion of Mr. Griffin in this respect. It may be that such a requirement was intended, but the intent appears not to be expressed in the Act, and it is my understanding that the Beverage Control Division of the Department of Revenue has been construing the Act differently. It appears to be quite clear from the Act that if the applicant intends to engage in the business within a municipality, application must first be made to the municipal authorities for a license before a license may be granted by the county authorities. That is to say, the city authorities will pass upon the qualification of the applicant and the county authorities will be governed accordingly. If the applicant intends to engage in business outside of the corporate limits of the municipality, then the applicant must satisfy the county authorities as to his qualification. When we come to Section 515 (G. S. 18-79) dealing with the issuance of State retail licenses, we find nothing therein which requires the State to ascertain before issuing the license whether local licenses have been issued to the applicant. The State license is imposed for the purpose of revenue and the issuance of a State license to one who, by reason of lack of qualification or otherwise, has not obtained his city and/or county license does not entitle the holder of the State license to engage in the retail sale of beer. The fact that a State license has been issued would constitute no impediment to the prosecution of one who engages in the retail sale of beer without first obtaining necessary local licenses. If one engages in the business of selling beer at retail without first obtaining proper local licenses, he would be guilty of a violation of the Act, and such violation would constitute grounds for the revocation of his State license.

It may be that under the provisions of Section 514 (G. S. 18-78), the Commissioner of Revenue might adopt rules and regulations which would require a showing by an applicant for a State license that he has obtained the necessary local licenses, but in the absence of such rules and regulations, I am of the opinion that, under the Act as written, the issuance of local licenses is not a prerequisite to the issuance of the State license.

INCOME TAXES; DEDUCTION; SPECIAL DEDUCTION FOR MAINTAINING
DEPENDENT RELATIVES IN INSTITUTION FOR CARE OF MENTAL
OR PHYSICAL DEFECTIVES

14 May 1948

You have requested me to give my interpretation of the provisions of subsection 9½ of Section 322 of the Revenue Act. Subsection 9½ reads as follows:

"Amounts actually expended by an individual, other than a married woman having a separate and independent income, who is not entitled to a personal exemption of \$2,000.00 under the provisions of subsections (a), (b), (c) and (d) of subsection 1 of section 324 in maintaining one or more dependent relatives in an institution for the care of mental or physical defectives irrespective of whether such dependent relatives be above or below the age of eighteen: PROVIDED, that the deduction authorized in this section shall apply only to actual expenditures in excess of the amounts allowed as personal exemption for dependents under the provisions of subdivision (e) of subsection 1 of Section 324, and the maximum amount that may be deducted by an individual under the authorization herein stated shall not exceed \$800.00."

I am of the opinion that the deduction authorized by subsection 9½, quoted above, can never be claimed by an individual who is entitled to a \$2,000.00 exemption because he is a married man living with his wife or because he is the head of a household. An individual who is entitled to \$1,000.00 personal exemption and who is a married woman living with her husband and having a separate and independent income, can never claim the deduction provided for in subsection 9½. The deduction provided for in subsection 9½ can only be claimed by a taxpayer who is not (1) a married man living with his wife, (2) the head of a household, whether man or woman, or (3) a married woman living with her husband and having a separate and independent income. These three classes of taxpayers are excluded from the benefits of subsection 9½.

The conclusion herein reached is supported completely by the explanation of subsection 9½ when its enactment was proposed in 1945. On page 19 of the explanations of the amendments to the Revenue Act for 1945, the following appears:

"From time to time certain cases arise where the present wording of the income tax law prevents the Department of Revenue from granting certain claims or deductions which would apparently be equitable in view of the intent of the law and treatment of other taxpayers. One such case is that of an individual who is not a widow or widower, who is supporting one or more relatives in a state or private institution. Under the law the individual is not entitled to a personal exemption as the head of a household because such dependents are not living in the same household and yet the expenses of supporting such relatives may be greater than would be incurred in maintaining a household. To grant such individuals some concessions more in accord with the treatment of other individuals an amendment is proposed." Underlining added.

It is also my opinion that a taxpayer who is entitled to the deduction authorized by subsection 9½, may claim the full \$800.00 provided for therein in addition to the \$200.00 dependence exemption authorized by Section 324 of the Revenue Act. For example, a single man maintains and supports his mentally incompetent brother in an institution at an annual cost of \$1,000.00. This man is, in my opinion, entitled to the full \$800.00 deduction authorized by subsection 9½ and in addition thereto is entitled to the \$200.00 exemption authorized by Section 324 of the Revenue Act for dependents. If the annual cost of maintaining this taxpayer's mentally incompetent brother in an institution were only \$900.00, then, in my opinion, this taxpayer would be entitled to the \$200.00 exemption authorized by Section 324 of the Revenue Act and only a \$700.00 deduction under subsection 9½ of Section 322 of the Revenue Act. In other words, the combined exemption and deduction can never exceed \$1,000.00 for each dependent maintained in an institution nor can it exceed the amount actually expended if such sum is less than \$1,000.00.

In a letter to you on January 11, 1946, on this subject, former Assistant Attorney General Spruill, in illustrating the application of subsection 9½ of Section 322 used as an example a married man living with his wife and maintaining his son in a mental institution. This illustration or example is not a proper one because no deduction can be claimed under subsection 9½ of Section 322 by a married man living with his wife. The portion of the letter of Mr. Spruill in which the above illustration appears no longer expresses the opinion of this office and said portion is hereby recalled and overruled.

INCOME TAXES; EXEMPTIONS; COOPERATIVE ASSOCIATIONS; CHAPEL HILL
MUTUAL DISTRIBUTORS, INC.

15 May 1948

You have referred to me a copy of the charter and the by-laws of Chapel Hill Mutual Distributors, Inc., and requested me to advise you whether, in my opinion, that corporation is exempt from income taxes.

From the charter of the corporation it appears that it was organized under subchapter 4 of chapter 54 of the General Statutes as that subchapter appeared in chapter 93 of the Consolidated Statutes. From the charter of the corporation it appears that it was organized for the following purposes:

"To purchase, either as agent, or on its own account as principal, and to resell all kinds of products, goods, wares, and merchandise from, to, or for its members or others, and to render, or contract for rendering, every character of services, both for its members and for others.

"The corporation shall also have power to conduct its business in all branches, to have one or more offices either within or without the state, and to unlimitedly hold, purchase, mortgage, lease, convey and otherwise deal in and dispose of real and personal property of all kinds, subject always to the provisions of the laws of the State of North Carolina."

In my opinion the corporation is not exempt from the payment of income taxes. Subsection 9 of section 314 of the Revenue Act exempts from the income tax laws only those mutual associations formed under subchapter 4 of chapter 54 of the General Statutes which are formed to conduct agricultural businesses on the mutual plan. The exemption in that subsection of marketing associations organized under subchapter 5 of chapter 54 of the General Statutes has no application here, since this corporation was not formed under that subchapter. Since the corporation was not formed to conduct and is not conducting an agricultural business on the mutual plan, I advise that in my opinion it should file returns and pay taxes on the net profits earned by it.

INTANGIBLES TAX; EXEMPTIONS, SECTION 714 OF THE REVENUE ACT; BANK DEPOSITS OF AMERICAN LEGION POSTS

21 May 1948

I have your letter of May 4 in which you ask my opinion as to whether bank deposits of American Legion Posts are exempted from the intangibles tax.

The applicable provision of Section 714 of the Revenue Act reads as follows:

"None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial."

By reference to the Machinery Act of 1939, as amended, which governs the listing and assessing of real estate and tangible personal property, the American Legion or Posts of the American Legion, as well as "patriotic" and "historical" associations, are specifically mentioned in the exemption sections. Section 600 and 601. Section 304 of the Machinery Act, however, provides:

"None of the provisions contained in any of the sections of this article shall be construed to conflict with Article VIII, Schedule H, of the Revenue Act, but rather shall they be subordinate thereto."

The matter of exemption from the intangibles tax is governed by the provisions of the intangibles tax act as first quoted above. In view of the well-established principle that exemptions from taxation are to be construed strictly in favor of taxation and against exemptions, I am of the opinion that the American Legion or a Post of the American Legion does not fall within the terms of the exemption statute. I am aided somewhat in reaching this conclusion by the fact that the Machinery Act which deals with intangible personal property specifically mentions "patriotic" associations as well as benevolent and charitable associations. Section 714 of the Revenue Act, on the other hand, omits any mention of patriotic associations or organizations and only extends the exemption to non-profit religious, educational, charitable, or benevolent organizations, except for other types of associations and corporations specifically mentioned in the section.

I am, therefore, of the opinion that bank deposits to the credit of the American Legion or Posts of the American Legion are not exempt from the intangibles tax.

INTANGIBLES TAX; TAX ON BANK DEPOSITS; DEPOSITS OF A FOREIGN
LIFE INSURANCE COMPANY

26 May 1948

I have before me your letter with reference to the request of the Paul Revere Life Insurance Company for a refund in the amount of \$6.20 deducted from the account of that company by a bank in this State and remitted to the Department of Revenue.

It is my information that the bank deposits in question represents policy premiums collected within this State. Exemption is claimed on the ground that the deposits are subject to withdrawals only by officers of the company in Worcester, Massachusetts, and that they, therefore, do not have a taxable situs in this State. The company calls attention to an opinion rendered by this office under date of September 6, 1945.

The former opinion referred to was concerned with bank deposits of a foreign insurance company representing premiums collected by out-of-state agents on out-of-state property. That opinion contained the following statement:

"The question involved is whether the foreign insurance corporation is liable for the payment of the intangibles tax upon money deposited in this State which represents insurance premiums collected from without the State by its out-of-State agents. It should be noted that this opinion is *not* concerned with the taxation of money or deposit here which represents premiums collected by local agents, or premiums collected for insuring property located within this State." The former opinion also contained this language:

"... But, under the business situs rule, bank deposits of a non-resident which are maintained as incidental to the carrying on of a local business are subject to taxation by the State in which they are kept.

"There are numerous cases in which the courts have been called upon to decide when bank deposits of a non-resident are maintained within a state as incidental to carrying on a local business. In *New England Mutual Life Insurance Co. v. Board of Assessors*, 47 So. 27, it was held that premiums collected by a local agent of a foreign insurance company and deposited in a local bank were taxable even though it was customary to make weekly remittances of much funds to the home office. In so holding, the court pointed out that the money was realized in the course of a business done in the State by a local agent. The fact that the premiums were collected locally and by local agents seems to have been the decisive point in this decision."

In my opinion, the fact that the deposits are subject to withdrawal only by non-resident officers of the insurance company is not determinative of the question involved. The determinative fact is that the deposits are the

result of and are, therefore, connected with local business activity, and the deposit is not a mere custodial account of a non-resident.

I am, therefore, of the opinion that the requested refund must be denied.

SALES AND USE TAXES; PANEL PARTITIONS; MAXIMUM TAX

3 June 1948

I have your letter of May 21, 1948, in which you request my opinion on the following:

An out-of-State concern (hereinafter called company) manufacturers panel partitions. This company has a representative who is permanently located in this state and who solicits orders for panel partitions which are subject to confirmation or rejection at the home office of the company in Cleveland, Ohio. You inquire if the sales of these panel partitions sold in the manner outlined herein are subject to the use tax in this state and, if so, whether the maximum tax of \$15.00 applies thereto.

Subsection (j) of Section 105-219 of the General Statutes of North Carolina (Sec. 801 of the Revenue Act), a part of the General Compensating Use Tax, reads in part, as follows:

"'Engaged in business in this State' shall mean the selling or delivering in this State or any activity in this State in connection with the selling or delivering in this State of any tangible personal property for storage, use, or consumption in this state, and includes, but is not limited to, any of the following acts or methods of transacting business: . . . permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser, or solicitor operating in the State in such selling or delivering, and the fact that any corporate retailer, agent, or subsidiary, engaged in business in this State, may not be legally domesticated or qualified to do business in this State, shall be immaterial."

Subsection (g) of the same section defines "retailer" as every person engaged in the business of making sales of tangible personal property for storage, use, or consumption in this State and expressly includes therein peddlers and solicitors.

The use tax is levied on the user of the property in this State by G. S. 105-220 (Sec. 802 of the Revenue Act). However, every retailer "engaged in business" in this State is required to collect the tax and is prohibited from advertising that he will absorb the same. G. S. 105-223 (Sec. 805 of the Revenue Act).

It appears thus that when the company's representative, agent, salesman, canvasser, or solicitor, permanently located in this State, solicits orders for prefabricated structures manufactured by the company outside of this State and those orders are accepted by the company and filled by shipment direct to the purchaser in this State, the company is "engaged in business" in this State within the meaning of the North Carolina Use Tax Statutes and is required by G. S. 105-223 (Sec. 805 of the Revenue Act) to collect the use tax on such sales and remit said tax to this State.

A state may require an out-of-state concern, which is engaged in business in the state, to collect the use tax on property sold for use, consump-

tion, or storage in the state, and such a requirement imposes no burden upon nor does it discriminate against interstate commerce. *Nelson v. Montgomery Ward Company*, 312 U. S. 377, 65 L. ed. 899 (1940); *General Trading Company v. State Tax Commission*, 322 U. S. 335, 88 L. ed. 1309 (1943).

In the *Montgomery Ward Case*, *supra*, soliciting orders by advertisements alone was held sufficient to repel an attack on a statute similar to the one under consideration on the ground that it imposed a burden on or discriminated against interstate commerce. It is true that in that case the respondent also maintained retail stores in the taxing State which were operated separate and apart from the mail order business. This fact, however, was declared by Mr. Justice Frankfurter in the *General Trading Company Case*, *supra*, to have no constitutional significance. There, it is said:

"And the fact that in the *Sears, R. & Co.*, and *Montgomery Ward and Company* cases the interstate vendor also had retailed stores in Iowa, whose sales were appropriately subject to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance."

I am also of the opinion that the maximum tax of \$15.00 fixed by G. S. 105-220 (Section 802 of the Revenue Act) and G. S. 105-168 (Section 405 of the Revenue Act) applies to the sale of each complete partition. If more than one partition is used in the completion of one job, each partition should be considered a separate unit and the maximum tax applied thereto if the purchase price is \$500.00 or more. From the facts stated in your letter I assume that there are actual sales only of partitions and not the parts thereof. If the partitions are not sold as such but are sold merely as parts which will later be put together to form a partition, there will be no sale of a single unit and the tax should be computed on the total sales price even though the tax may exceed \$15.00.

OPINIONS TO DEPARTMENT OF AGRICULTURE

MARKETING AND BRANDING FARM PRODUCTS; DEFINITION OF "FARM PRODUCTS"

10 March 1947

In your letter of the 6th of March, 1947, you refer to G. S. 106-185 of the General Statutes relating to the establishment of standard packages and the maintenance of standard grades and packages and State brands for farm products, and inquire if under this section of the law the definition given therein is broad enough to include agricultural, horticultural, viticultural, dairy products, livestock and poultry, bees, and any products thereof, including processed and manufactured products, and any and all other products raised or produced on farms and any processed or manufactured product thereof.

The statute referred to is as follows:

"The purpose of this article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages and state brands for farm and horticultural crops and animal products. The term 'farm products,' as used hereafter in this article, shall be construed to mean any or all of the crops and products named above in this section."

The term "farm products" is very broad in its meaning and has been so construed by the courts. It includes swine, horses, meat, cattle, sheep, manure, cord wood, hay, as well as vegetables, fruit, eggs, milk, butter lard and other provisions for the mouth. *KEENEY v. BEASMAN*, 182 A. 566, 569, 169 Md. 582, 103 A. L. R. 1515. It has also been construed to include raw centrifugal sugar within the meaning of the statute of Puerto Rico exempting growing crops and products of land actually owned by and still in the hands of the producer from taxation. *SANCHO v. BOWIE*, CCA Puerto Rico, 93 F. (2d) 323, 325.

Agricultural products has been construed in its broad sense as including farming horticulture, and forestry, together with such subjects as butter and cheese making, sugar making, etc.

NORTHERN CEDAR CO. v. FRENCH, 230 P. 837, 846.

The Supreme Court of North Carolina has construed "livestock" as a farm product. *STATE v. SPAUG*, 129 N. C. 564.

Under an old taxing statute placing a tax upon vendors of spirituous vinus or malt liquors but exempting therefrom the sale of such spirits or wines by any person manufacturing and selling the same from the products of his own farm, it would seem that the Legislature of this State recognized that such beverages were products of the farm.

No particular case in any jurisdiction has been found which holds that bees and their product are products of the farm. However, in view of the fact that bees and the raising of honey is largely carried on by farmers or on farms, the same would be considered farm products, to the same extent as would dairy and poultry products.

Your attention is invited, however, to the fact that the term "farm products" is limited in the statute to which you refer to mean "any or all of the crops or products named above in the section," and that the only crops or products named in the section are "farm or horticultural crops and animal products." It would eliminate viticultural products, if the definition were tested because this product does not appear to be included among those listed in the definition. In view, however, of the broad definition given by the courts to the terms "agricultural" or "farm" products, and in further view of the fact that this statute has been on the books since 1919 and no one has as yet seen fit to test it in the courts, no necessity is seen at this time to enlarge this definition.

DOUBLE OFFICE HOLDING; TOBACCO SPECIALIST

2 April 1947

In your letter of the 31st of March, 1947, you state that an employee of the Department of Agriculture is a tobacco specialist whose duty is to work with farmers, warehousemen, and the tobacco industry in a purely instructional and advisory capacity, and that he makes occasional reports on the condition of tobacco informally but not in an official capacity, and you inquire should he become a City Councilman in the City of Raleigh, if he could continue his work with the Department of Agriculture and by doing so not violate the provisions of Article XIV, Section 7 of the Constitution, which prohibits double office holding.

It is not thought that the provisions of the Constitution with respect to double office holding would affect this man, since upon the facts stated he is not a public officer of the State of North Carolina. It is suggested that perhaps if the man to whom you refer is an employee of the Federal Government in any capacity, that he might come within the terms of the Hatch Act which declares it to be unlawful for Federal employees to take any active part in political management or in political campaigns. The Hatch Act was recently upheld by the Supreme Court of the United States in the case of UNITED PUBLIC WORKERS OF AMERICA (CIO), et al v. MITCHELL, in Case No. 20 of the October Term of the Supreme Court of the United States, 1946. This opinion was rendered on the 10th of February, 1947.

DEPARTMENT OF AGRICULTURE ARTIFICIALLY BLEACHED FLOUR; LIABILITY OF MANUFACTURER FOR INSPECTION FEE

22 April 1947

You state that there is one flour miller in the state who sells his bleached flour directly from the mill to the consumers. The flour does not go through any immediate broker, handler or retailer. This miller has paid the inspection fee for the current year; however, he feels that because he is a miller and sells direct, that he should not pay an inspection tax on this brand of flour.

You would like to know if this miller is liable for an inspection fee under the laws of the state.

Section 106-215 of the General Statutes is as follows:

"For the purpose of defraying expenses incurred in the enforcing of the provisions of this article, for each and every separate brand of artificially bleached flour registered and before being offered for sale in the state, the manufacturer, dealer, or agent registering same shall pay to the commissioner of agriculture an inspection fee of fifteen dollars, and during the month of January in each year, or before such flour is offered for sale in the state, said fees to be used by the board and commissioner of agriculture for executing the provisions of this article."

From the above-quoted section it is plain that any manufacturer or dealer, or agent is required to pay the inspection fee. The miller mentioned in your letter would fall within the category of manufacturer, but at the same time he would also fall within the category of dealer because he not only manufactures flour, but he sells direct to the consumer. In other words, he performs both functions, that of manufacturer and dealer.

If I could do so, I would be glad to say that he is not required to pay the fee. Under the provisions of the above statute, however, I am compelled to advise you that this fee or inspection tax should be paid by a miller who sells direct to consumers, as well as any other dealer or agent.

TOBACCO CURERS; CHAPTER 787, PUBLIC LAWS OF 1947; RULES
AND REGULATIONS ADOPTED

30 May 1947

I have your letter of May 30, referring to Chapter 787 of the Public Laws of 1947 dealing with the reduction of fire hazards in tobacco curing barns, and enclosing to me Regulation No. 21 adopted by the State Board of Agriculture. You inquire as to whether or not, under the Act, the Board in my opinion is authorized to adopt this regulation.

Chapter 787 amends Section 14 of Article 1 of Chapter 81 of the General Statutes. G. S. 81-2 authorizes and empowers the State Board of Agriculture to adopt and make such rules and regulations as may be necessary to make effective the purposes and provisions of the article in which said section appears, to wit, Article 1, and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct or incorrect equipment used in the buying or selling of any commodity or thing, etc. Such rules and regulations and fees and charges shall be published thirty days before they become effective.

The rules and regulations adopted as Regulation No. 21 is, in my opinion, authorized by the law above referred to and is in keeping with the provisions of Chapter 787 of the Public Laws of 1947 above referred to.

CO-OPERATIVE ORGANIZATIONS; CREDIT UNIONS; HOUSE BILL No. 1114;
SCOPE OF COVERAGE

14 July 1947

In your letter you refer to House Bill No. 1114 which is an Act to direct the Department of Tax Research to make an examination of the problem of taxing co-operative associations and to require such associations to file with the Department of Revenue reports containing information for use in such examination.

The above Act, passed by the General Assembly of North Carolina at its 1947 Session, requires the Department of Tax Research to make a thorough examination and study of co-operative associations, especially as relating to their status with respect to the tax laws, the difference between the various types of co-operative associations, and the extent to which such associations should be taxed under the laws of the state. The co-operative associations operating in the state are required to file with the Commissioner of Revenue on or before September 15, 1947, reports giving certain information as required by the Act, and a similar report may be required by the Commissioner of Revenue to be filed on or before September 15, 1948. There is a penal provision in the Act to the effect that any co-operative association, and any officer or other person required to file a report, who wilfully fails to file such report, or to supply the information required, shall be guilty of a misdemeanor and subject to the same penalties as those imposed for a wilfull failure to file an income tax return. Upon this information the Department of Tax Research is required to make a written report of its investigation with its recommendations and to advise the Budget Commisison prior to the convening of the General Assembly of 1949.

You inquire of this office if credit unions come within the scope of coverage of this Act, or in other words, are credit unions required to file the reports required by the provisions of House Bill No. 1114?

I would first like to call your attention to certain terms or designations set forth in Chapter 54 of the General Statutes which contains the law authorizing the formation of co-operative organizations. You will note that Chapter 54 of the General Statutes contains fifteen articles authorizing the formation of various co-operative organizations such as building and loan associations, land loan associations, credit unions, co-operative associations, and marketing associations. The legal authority that form these various co-operative organizations is incorporated in one Chapter in the General Statutes and bears the caption or subject of "Co-operative Organizations." Attention is particularly called to the fact that Article 16 of sub-chapter IV of Chapter 54 of the General Statutes bears the caption or title of "Co-operative Associations." Article 16 deals with the organization of associations and Article 19 of subchapter V of this same chapter, deals with kindred associations designated as "Marketing Associations."

Attention is now called to the title of House Bill No. 114, which directs the Department of Tax Research to make an examination of the problem of taxing *cooperative associations*. Section I of this Act directs the Department of Tax Research "to make a thorough examination and study of *co-operative associations*," and also it is made a misdemeanor under Section 3 of the same Act for "any co-operative associations, etc.," to wilfully fail to file a report.

We are informed that the legislative history of this Act shows that originally a bill was introduced that would repeal some of the provisions of the co-operative law and would levy certain taxes against co-operative associations, and it further appears that one of the merchant associations or organizations was interested in this Bill because certain types of co-operative associations had considerably expanded their activities, and it was contended that such co-operative associations handled practically all of the articles of produce and merchandise that was regularly handled by

merchants in the ordinary course of business, and that the merchants were subject to the various tax laws of the state. Several hearings were held before the Legislative Committee, including one large hearing attended by many people, which was held in the Memorial Auditorium of the City of Raleigh. After some hearings, and because of the conflicts of the various interested groups, a decision was reached which was incorporated in House Bill No. 1114 requiring the investigation described above. I am informed that during all of this controversy no question was ever raised about building and loan associations, land loan associations, or credit unions. The controversy did involve, however, co-operative associations formed under Article 16 of Chapter 54 of the General Statutes, and Article 19 of Chapter 54 of the General Statutes. Regular co-operative associations as formed under Article 16 of Chapter 54 of the General Statutes can engage in certain businesses as follows, and I quote sub-section 54-111:

"Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; provided, that the membership of agricultural organizations incorporated under this subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers."

Marketing associations as authorized by Section 54-132 of the General Statutes may engage in certain businesses as follows:

"An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein."

It is evident, therefore, that the law itself makes a distinction between all co-operative organizations and co-operative associations. "Co-operative organizations" is a generic term, while "co-operative associations" is a branch or species of co-operative organizations. There was never any contention that building and loan associations, credit unions, and land loan associations were granted unfair privileges, or were engaged in serious competition with banks, mortgage companies, or their various counterparts in private business. I have also talked with Representative Henry Fisher of Buncombe County, who sponsored the first Bill introduced which brought on the whole controversy, and who was also the sponsor of House Bill No. 1114, and he tells me that it was never his intention, or those allied with him in this controversy, to investigate credit unions and building and loan associations. On the contrary he tells me that it was the intention of those interested to investigate the organizations formed under Article 16 and Article 19 of Chapter 54 of the General Statutes.

I am of the opinion, therefore, both from the language used in Chapter 54 of the General Statutes and House Bill No. 1114, and also from the legislative history of House Bill No. 1114, that the conformance authorized by House Bill No. 1114 was never intended to, and does not apply, to credit unions, or for that matter building and loan associations, and therefore, it is my opinion that credit unions are not required to file the reports required by House Bill No. 1114, and do not come within the scope of coverage of that Act.

I might add that I have discussed this matter with the Attorney General and he is in agreement with the interpretation of House Bill No. 1114 as explained in this letter.

AGRICULTURE; LIVESTOCK MARKETS; IMPORTATION AND SALE OF CATTLE
FOR IMMEDIATE SLAUGHTER

16 July 1947

In your letter of the 9th of July, 1947, you inquire if under Section 17, Regulation No. 4, of the Livestock Sanitary Laws and Regulations adopted by the Board of Agriculture on January 3, 1946, livestock market operators may import cattle into this State and sell the same at a livestock market at public auction for slaughter.

Section 17 of said rules and regulations is as follows:

"17. Immediate Slaughter. Apparently healthy cattle of strictly slaughter type to be used only for immediate slaughter may be imported into the state without a health certificate or tuberculin or brucellosis test, provided such cattle are consigned for immediate slaughter to a recognized slaughtering establishment or slaughtering center that is approved and designated by the State Veterinarian. Such cattle shall be slaughtered within ten (10) days after arrival at destination, except when the ten-day period is extended by special permit from the State Veterinarian."

It is thought that the language used in this regulation "consigned for immediate slaughter to a recognized slaughtering establishment or slaughtering center that is approved and designated by the State Veterinarian" means that such cattle being imported into this State without a health certificate may not be sold at a public livestock market at public auction, but must be consigned from the shipping point outside the State to a slaughtering establishment or center approved and designated by the State Veterinarian.

DEPARTMENT OF AGRICULTURE; FERTILIZER ACT OF 1947; INTERPRETATION
OF THE VERB, "BRANDING," IN SECTION 10 OF THE ACT; NECESSITY
OF USING BOTH BRAND AND TAG

16 July 1947

In your letter of July 12th, 1947, you refer to a portion of Section 10 of the North Carolina Fertilizer Act, which reads as follows:

"This grade of regular tobacco fertilizer (3-8-5) shall be branded 'low grade' and shall carry a red tag reading as follows: 'This is a low grade fertilizer'."

You state that some manufacturers are of the opinion that you have no alternative in the construction of this statute other than to cause the fertilizer to be branded as "low grade." It appears, however, that other manufacturers contend that the attachment of tags, especially red tags, reading, in part, "This is a low grade fertilizer," is sufficient branding to comply with the provision above quoted. You raise the question as to what is meant by the verb, "branded" as used in the statute. In other words, you would like to know if this relates to the brand name of the fertilizer so that the words "low grade" will have to be included in the brand name so that, as an example, it would read "Brown's Low Grade 3-8-5 Tobacco Fertilizer," or if branding is an independent process, what does it mean; and it seems to me that you also raise the question, if the use of the phrase "This is a low grade fertilizer," is sufficient branding when placed on a tag.

It seems clear to us that the above quoted portion of Section 10 of the Act requires two things as to this grade of tobacco fertilizer. It must be branded "low grade"; and there must be affixed to it a red tag carrying the language as to low grade fertilizer as required by the section. These requirements are written in the conjunctive; and it, therefore, means that two things must be done and not one, such as the tagging alone. If affixing the tag with the necessary language printed on same to the fertilizer was alone sufficient, there would have been no necessity for writing into the statute that it should be branded as low grade. I am of the opinion, therefore, that this type of fertilizer must both be branded as low grade and must carry the necessary red tag with the statutory language written or printed thereon.

I come now to the meaning of the verb "branded." In the case of *DIBBLE v. HATHAWAY*, 11 Hun. 571, 575, in speaking of the verb "brand," the Court said:

"'Brand' means generally to stamp or to mark, and, as used in the statute requiring that every manufacturer of butter shall brand in legible letters on the side of each tablet, etc., his name and the weight of the vessel, means that the name and weight shall be marked on the tub in a distinct manner, as by a stencil plate and chisel, but it is not necessary that they be actually branded into the tubs."

In the case of *POLLOCK v. KANSAS CITY*, 123 P. 985, 986; 87 Kan. 205; 42 L.R.A. (N.S.) 465, the Court said:

"The word 'brand' derivatively has reference to burning, and in many cases signifies a distinctive mark placed on objects by a hot iron. The verb has been judicially defined as meaning to stamp or to mark, as by a stencil, plat, or chisel, and the noun as indicating some figure or device burned on an animal by a hot iron."

I am of the opinion, therefore, that the verb "to brand," as used in the above portion of Section 10 of the Act, means that the words "low grade," must be stencilled, stamped, marked or by some device written or placed upon the sack or container holding this type of fertilizer. It must be written, marked or stamped in a legible manner so that it can be easily seen and read and in a proper position or place on the container or sack in order to carry out the purpose of the statute. It can be incorporated in

and made a part of the brand name of the manufacturer, if he so desires, or it can be written or stamped immediately below the brand name. The statute does not designate the position, but Section 15 of the Act permits the Board of Agriculture to prescribe such rules and regulations as may be found necessary for the enforcement of the Act; and I think it would be within the rule-making power of the Board to pass a reasonable regulation designating the position where the words "low grade" shall be stamped. Some manufacturers might object to incorporating these words into or making them a part of the brand name while others would not care. Of course, when the proper brand has been affixed as to the words "low grade," the red tag must also be affixed, as required by the statute.

LIBEL AND SLANDER

6 August 1947

In your letter of the 5th of August, 1947, you state that a Negro man in Columbia, North Carolina, is going about over that section of the State making statements to the effect that certain credit unions are insolvent and unsafe and that this action on his part is beginning to have a serious effect on some of your rural Negro credit unions, all of which have been examined recently and have been found to be solvent. You request an opinion from this office as to what procedure you may take to put an end to the activities of this man.

I have been unable to find any law which would cover your exact situation.

There is a law applicable to banks, G. S. 53-128, which makes it a crime for any person to make derogatory reports against any banking institution. I do not find any such law with respect to credit unions.

There is a statute, G. S. 14-47, which provides that if any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor. If the person to whom you refer has caused such statements to be published in a newspaper, you could, of course, have him indicted under this Act.

FERTILIZER LAW; DEPARTMENTAL REGULATIONS

7 August 1947

In your letter of the 6th of August, 1947, you state the following:

"The Board of Agriculture will, in all probability, tomorrow, August 7th, adopt an official fertilizer grade list consisting of twenty-five grades. We should like, in addition to this official grade list, to permit a manufacturer to make grades of fertilizer in the same ratio as those on the official list. For example, 14-0-14 will be an official grade; the grade 16-0-16 would be of higher analysis and, in some respects, more economical to the farmer. Another example is the case of 3-9-6; the grade 4-12-8 would be of the same ratio, namely a 1:3:2 ratio.

"I shall appreciate your advising us as to whether Regulation No. 6 would be in violation of Section 11 of the Act."

Section 11 of the North Carolina Fertilizer Act of 1947 reads as follows:

"The Board of Agriculture, after a public hearing open to all interested parties, and upon approval by the Director of the Agricultural Experiment Station, shall, prior to June 30th of each year or as early as practicable thereafter, promulgate a list of grades of mixed fertilizer adequate to meet the agricultural needs of the State. After this list of grades has been established, no other grades of mixed fertilizers shall be eligible for registration. The Commissioner may revise this list of grades by conforming to the procedure prescribed in this Section."

Proposed Regulation No. 6 reads as follows:

"Registration of grades representing higher multiples of the ratios of any of the grades appearing on the official grade list may be accepted by the Commissioner: *Provided*, that the higher multiples accepted shall increase the plant food content of the fertilizer in steps of not less than three units."

It is the opinion of this office that to adopt the proposed Regulation No. 6 would be in direct violation of the second sentence of Section 11, and would in effect, permit the establishment of "other grades" of mixed fertilizer which is prohibited by the section in the absence of a public hearing as therein provided.

FOOD AND DRUG LAW: AGRICULTURE; OLEOMARGARINE

24 September 1947

In your letter of the 23rd of September, 1947, you state that Swift and Company has asked you the following questions:

"We would also like to know if it is permissible to ship colored oleomargarine direct to the hotels, cafes, and institutions from out of State, and be billed by the local branch? Would the local wholesale branch have to have a special license to handle in this way?"

Your attention is invited to the 1945 amendment to the Oleomargarine Act, Article 23 of Chapter 106 of the General Statutes, which provides that it shall be unlawful to serve in any public dining room, restaurant, cafe, boarding house or hotel, as a food, oleomargarine which is of yellow color.

Prior to the enactment of the 1945 amendment, yellow oleomargarine was not permitted to be sold anywhere in this State. In view of this amendment, however, yellow oleomargarine may be sold in this State; but it is unlawful for any public dining room, restaurant, cafe, boarding house or hotel to serve the same. In view of this, it would appear that the question raised by Swift and Company is moot for the reason that if such establishments may not serve yellow oleomargarine, it is doubtful if any purchases of the same would be made.

Regardless of the above, it is not thought that Swift and Company is permitted, under the law, to ship colored oleomargarine direct to hotels, cafes, and institutions from out of the State and be billed for the cost of the same by Swift and Company's local branch and thereby avoid the payment of the wholesaler's license tax levied under G. S. 106-235.

WEIGHTS AND MEASURES; MEASURING DEVICES; TYPES

27 October 1947

In your letter of the 25th of October, 1947, you refer to Regulation No. 7 promulgated by the Department of Agriculture under authority of G. S. 81-2; and in particular you refer to Section 4 of this Regulation which provides that measuring devices which are approved by your Division shall be labeled, stamped, or otherwise permanently attached to, and in a conspicuous place, the following words "NORTH CAROLINA APPROVED TYPE (or MODEL) SERIAL NO....." (or equivalent) by the manufacturer thereof, the serial number to be furnished by the State Superintendent of Weights and Measures.

You further state that a new specification has been promulgated in the interest of uniformity in labeling for identification, and the manufacturers desire to leave off the special tags of approval as required by Section 4 of Regulation No. 7. You inquire if this new identification plate will be sufficient in carrying out the North Carolina law if the approval plate required by Section 4 of Regulation No. 7 is left off.

It is not thought that the provisions of Section 4 of said Regulation may be overlooked in the absence of a repeal of said Section.

You further inquire if there is any authority for Section 4 of Regulation No. 7 to be rewritten so as to require the manufacturer of a weighing device to post a bond with you guaranteeing that the weighing device bearing his name plate is approved for sale in this State.

I find no statutory authority for you to require the manufacturer to post such bond; and in the absence of such authority, you may not do so.

DEPARTMENT OF AGRICULTURE; SEED LAW; VENUE OR PLACE OF TRIAL FOR
ALLEGED VIOLATION OF SEED LAW; SEED SHIPPED, ORDER
MODIFIED; PLACE OF SALE

5 December 1947

It appears from your letter that the Department is interested in instituting criminal proceedings against a wholesale seed dealer in Pamlico County, North Carolina, for an alleged violation of the North Carolina Seed Act. It appears that the seed in question were shipped by the wholesale dealer to a firm in Hendersonville, North Carolina, sight draft, bill of lading attached, or what is commonly called an order notify shipment.

You inquire of this office as to whether or not a criminal action in this matter could be instituted in Henderson County.

Section 106-283 of the General Statutes (Cumulative Supplement of 1945) contains a list of prohibited acts in connection with the sale of seed. The first sentence of this Act is as follows: "It shall be unlawful: (a) for any person within this State to sell, offer, or expose for sale any agricultural or vegetable seed for seeding purposes: . . . (3) Not labeled in accordance with the provisions of Section 106-281, or having a false or misleading label:"

The venue or place of trial for alleged crimes in the State of North Carolina is local or in other words, the courts of that county would have jurisdiction and would be the place of trial for crimes which transpire or take place within the territorial limits of such county. This is universally true in this State, subject to removal or change of place of trial because of local prejudice and in order to obtain a fair trial as provided by statute. In this case described in your letter, it appears to us that that county would have jurisdiction where the sale was made; and, therefore, the question is, was this sale made in Pamlico County or in Henderson County. Under the authorities of the Supreme Court of North Carolina, and in fact, the appellate courts of many other states, where goods or commodities are shipped and a sight draft or bill of lading attached is sent to the consignee or usually to some bank with instructions to notify the consignee, the title to the goods or commodities does not pass until the draft is paid. *EARLY v. FLOUR MILLS*, 187 N. C. 344; *DAVIS v. GULLEY*, 188 N. C. 80.

In *EARLY v. FLOUR MILLS*, *supra*, it is said:

"It is also the general holding that when a seller ships goods 'order notify,' and draws draft for purchase price, with bill of lading attached, the title and right of possession to the property are reserved by the seller until the draft is paid. No title passes to the purchaser, and any loss in transit, as between the buyer and the seller, must be borne by the latter. *COLLINS v. R. R.*, *ante*, 141; *WATTS v. R. R.*, 183 N. C., 12; *PENNIMAN v. WINDER*, 180 N. C., 73; *RICHARDSON v. WOODRUFF*, 178 N. C., 46; 35 Cyc., 332."

It appears to us, therefore, that the transaction described by you did not become an executed sale until the title to the seeds passed to the wholesale firm in Hendersonville, North Carolina; and this title did not pass until this firm paid the draft in Hendersonville and got the bill of lading. In our opinion, therefore, the sale was not completed and the title did pass to these seeds in Hendersonville, North Carolina, in Henderson County. We are further of the opinion that if you institute criminal proceedings against the wholesale seed dealer in Pamlico County, that in this case, the place of trial would be in Henderson County, North Carolina.

AGRICULTURE; LINSEED OIL; INSPECTION TAX; ATTACHMENT OF TAX TAGS
TO LINSEED OIL CONTAINERS; REPACKAGING LINSEED OIL SHIPPED
IN BULK INTO SMALLER CONTAINERS

12 December 1947

You state that a Delaware concern has asked your Department to clarify its position with reference to certain possible situations dealing with linseed oil and the possible responsibility of this concern in these situations. These situations deal with the payment of the inspection tax on linseed oil and the attachment of tax tags or stamps to the containers of same as required by Article 32 of Chapter 106 of the General Statutes. The situations relating to linseed oil about which you ask us to comment are as follows:

"Linseed oil shipped to a du Pont paint store in North Carolina from outside the state and on which the appropriate tax stamps are attached

to the containers. The store does not repackage but resells the linseed oil in containers supplied by the customer.

"2. Conditions identical with (1) above, except that there is no evidence that the tax has been paid on the linseed oil as shipped into the state.

"3. Linseed oil shipped into the state on which the tax has been paid, and linseed oil obtained from within the state on which the tax has been paid and repackaged by the paint store for sale under our own labels."

Our statutes dealing with the inspection tax are set forth in Sections 106-298 through 106-302 of the General Statutes. Inasmuch as you have your own printed copies of the Act, I will not quote the various sections as to Situation Number 1 set forth above and in your letter. Where the oil is shipped to this concern's store in this State from outside the State and the appropriate tax stamps are attached to the containers, I would say that if the store in this State resells this oil in containers supplied by the customer that the requirements of our Act have been met. Section 106-298 imposes the inspection tax before the delivery of the linseed oil to any agent, retail dealer or consumer in this State. Section 106-299 requires each barrel or other container of the oils named in the article to have attached thereto an inspection tag or stamp showing that the inspection charges have been paid. I would say, therefore, that if this linseed oil meets all the requirements before being delivered to the store that the fact that it is repackaged into smaller containers or placed in the customer's container would not require an additional inspection tag or stamp. The original oil having been taxpaid and stamped, the State would not exact another inspection tag or stamp for this same oil.

As to the situation described in Paragraph No. 2 above where the conditions are identical with Situation No. 1 except that there is no evidence that the tax has been paid on the linseed oil shipped into the State, I would say that if the tax is not paid and the oil containers not properly stamped after the same comes to rest in this State, this oil would be subject to seizure and condemnation as provided by Section 106-295 of the General Statutes. Furthermore, I see no reason why you could not exact and compel the store to pay the tax and attach tax stamps or tags to the original container in which the oil was shipped before any oil is placed in any container supplied by customers. Further, it would seem to me that if any store sold this oil without tax stamps, this would be a direct violation of Sections 106-288 of the General Statutes and 106-294. As you know, a violation of this latter statute is a criminal offense. I would advise, therefore, that this situation be avoided as such oil, so far as our statutes are concerned, is contrabrand.

In Situation No. 3, linseed oil is shipped into the State on which tax has been paid and linseed oil is obtained from within the State upon which the tax has been paid, and this oil is repackaged by the paint store for sale under its own label. While this situation contemplates oil delivered from both without and within the State in compliance with the law, nevertheless, there is the question of repackaging or placing this oil in additional containers by the paint store for sale under the concern's own labels. While it may be that originally our statute did not contemplate

the situation in which oil would be shipped in bulk and then transferred into smaller containers, nevertheless, our statute is so written that each container must have an inspection tag or stamp attached to it before the oil goes into sale. It is clear to me that even though the oil is tax paid originally in bulk, yet if it is transferred into smaller containers and put into the trade, these smaller containers must also contain the tax stamps or tags because they are still the containers of the concern in question. I would suggest, therefore, that some tax tag or tax system be worked out whereby although the oil in the original container in which it is shipped has the tax paid, still it would be necessary to affix the stamps to this container but that stamps be issued in the necessary denominations or sizes to be attached to the smaller containers alone. I think that you could require such a concern to merely label the shipment with its own label to the effect that the tax has been paid and that the necessary tax stamps for the small containers have been forwarded to the store. The store can then attach the stamps to the small containers which actually go into the trade, and it would not be necessary to issue a stamp for the container in which the oil is originally shipped. Under Section 106-299, the Board of Agriculture is authorized to make such rules and regulations, among other things, as to inspection tags or stamps as shall be of such a nature to meet the requirements of the trade of linseed oil. I think, therefore, that any reasonable requirement or regulation that you could work out with this concern and others who may wish to handle linseed oil in such a manner would be all right.

DEPARTMENT OF AGRICULTURE; REGULATION OF THE SALE OF IRISH AND
SWEET POTATOES FOR PROPAGATION PURPOSES

16 December 1947

In conference this morning you make reference to the Committee Substitute for House Bill No. 436 enacted by the 1947 General Assembly, Chapter 467 of the Session Laws of 1947, relating to the regulation of the sale of Irish and sweet potatoes in this State for the purposes of propagation. You particularly request an interpretation of the second paragraph of Section 2 of the Act which provides in effect that certified sweet and Irish potatoes and parts thereof for propagation uses shall mean sweet and Irish potatoes and parts thereof which conform to the standards adopted by the State Board of Agriculture, and which shall conform to the standards fixed by the International Crop Improvement Association. You state that the International Crop Improvement Association has adopted standards classifying sweet potatoes but has not adopted any standards with respect to Irish potatoes.

In view of the fact that the International Crop Improvement Association has not adopted any standards with respect to Irish potatoes, it is the opinion of this office that the standards adopted by the State Board of Agriculture would control. Of course, since the International Crop Improvement Association has adopted standards for sweet potatoes, such standards as may be adopted by the North Carolina Board of Agriculture would be required under the section referred to above to conform to those fixed by the International Crop Improvement Association.

FUNGICIDE AND RODENTICIDE ACT OF 1947

14 February 1948

In your letter of February 9, 1948, you ask if an individual residing in South Carolina and engaging in the business of vermin control, will be subject to the Rodenticide Act of 1947 if his contracts involve only a guarantee of extermination and not the sale of the materials used.

It is my opinion that this would not come within Chapter 1087, Section 3, Subsection (a), Session Laws of 1947, which provides:

"It shall be unlawful for any person to distribute, sell, or offer for sale within this State or deliver for transportation or transport in Intrastate Commerce or between points within this State through any point outside this State any of the following:"

It is my opinion that the act of using his own exterminating materials on extermination contract jobs would not be one of the prohibited acts.

You also ask if the individual referred to would be subject to the Act if he sold such materials to exterminating agencies in this State wherein the materials would be used only for the purpose of fulfilling extermination contracts.

This clearly would be a sale of an economic poison and the seller would be subject to the registration requisites and the other provisions of Chapter 1087.

AGRICULTURE; NORTH CAROLINA FOOD, DRUG AND COSMETIC ACT;
ADULTERATION OF DRUGS; SUBSECTION (K) OF SECTION 106-134 OF
THE GENERAL STATUTES; CONSTRUCTION OF CRIMINAL STATUTE

13 May 1948

You will recall our conversation in regard to the enforcement of subsection (k) of Section 106-134 of the General Statutes, which subsection is a part of the North Carolina Food, Drug and Cosmetic Act. You will further recall that when we conferred about this matter, Mr. H. C. McAlister, Secretary of the North Carolina State Board of Pharmacy, was present; and as I understand it, he is the duly designated representative of the North Carolina State Board of Pharmacy and is interested in the enforcement of this Act as provided by the Food, Drug and Cosmetic Law. As previously stated, your inquiry involves subsection (k) of Section 106-134 of the General Statutes, which is as follows:

"A drug or device shall be deemed to be misbranded: . . . If it is a drug sold at retail for use by man and contains any quantity of aminopyrine, barbituric acid, cinchophen, dinitrophenol, or sulfanilamide; unless it is sold on a written prescription signed by a member of the medical, dental or veterinary profession who is licensed by law to administer such drug, and its label bears the name and place of business of the seller, the serial number and date of such prescription, and the name of such member of the medical, dental or veterinary profession."

For the purposes of our discussion, you selected two substances named in this statute, one of which was barbituric acid, which you state is purely a chemical and that only preparations or derivatives of same are actually used as a medicine. The other substance selected was sulfanilamide, which you state is both a chemical and a drug; and while at one time, sulfanilamide itself was used where such drugs are indicated, however, at the present time, because of the strong toxic effects of sulfanilamide, there is now used preparations and derivatives of sulfanilamide, such as sulfadiazine and sulfathiazol and perhaps other derivatives. These latter derivatives are less toxic in their effects and are now used for purposes of medical treatment. As to all of these sulfanamides, you have shown me a brochure or pamphlet giving the structural formulae of these drugs beginning with the substance of benzene and representing the various chemical reactions until the desired drugs are obtained.

Referring to barbituric acid, you state that compounds or derivatives of this chemical are sold as drugs under various trade names, such as luminal, phenobarbital and perhaps other names. The compounds or derivatives of barbituric acid have strong sedative properties, and it is pointed out by both you and Mr. McAlister that these drugs are dangerous unless used according to the written directions of physicians or members of the dental or veterinary professions, as the case may be. The sedative drugs derived from barbituric acid are considered dangerous when used without proper medical direction, and there are records of deaths resulting from overdoses of these drugs. They are also sold in many places in the State of North Carolina, other than drugstores; and in some cases, they are dissolved in intoxicating drinks and consumed with exceedingly harmful results. The compounds or derivatives of sulfanilamide are also being sold without prescription, and the indiscriminate use of these drugs by the public at large leads to harmful results.

Under Section 106-126 of the General Statutes, the Commissioner of Agriculture can report violations of the Food, Drug and Cosmetic Act to various prosecuting officers, and under Section 106-124 of the General Statutes, the sale of a misbranded drug is a misdemeanor; and, upon, conviction, imprisonment in the county jail for not more than six months can be imposed or a fine of not more than \$200.00, or both such fine and imprisonment, and there is a heavier penalty imposed for a second conviction.

As I understand the matter, you and Dr. McAlister propose to proceed in the State by instituting criminal prosecutions against those persons or firms who have violated subsection (k) of Section 106-134 of the General Statutes if a sale of the compounds or derivatives of sulfanilamide and barbituric acid come within the meaning and definition of the statute as being drugs that must be sold upon written prescription, signed by a member of the medical, dental or veterinary profession, etc. In last analysis, therefore, your question is whether or not these compounds, derivatives or preparations shall be considered as containing quantities of sulfanilamide and barbituric acid and, therefore, come within the meaning of the statute or not.

In our conversation, you pointed out to me certain chemical principles which I discuss in my own language. You pointed out, generally stating, that a chemical compound is an "individual" with properties peculiar to

itself and different from those of its components. In such cases, a chemical reaction takes place, there is a displacement and combination of molecules; and the resultant compound or drug is, for all practical purposes, a new or different drug. It is given a different name from that of its components and is so regarded in the public mind and in popular language. You point out further that in a mixture, each constituent retains its own individuality and may be recognized by its own properties. As I understand it, this is also true where the mixture is in the form of a solution in which the constituent particles are of molecular dimensions.

It is very questionable in our minds if these compounds or derivatives come within the meaning of the statute in question, and we have great doubt about undertaking to institute criminal prosecutions based upon this statute for the sale of these drugs without written prescription or, in other words, that you should contend that these specific preparations or compounds, when sold without written prescription, would be misbranded drugs under the statute. For example, consider subsection (d) of Section 106-133 of the General Statutes. This subsection deals with the labeling of habit-forming drugs. You will notice that the drugs are listed by name, and at the end of the list is this phraseology: "or any chemical derivative of such substances." If you will likewise examine subsection (c) of this same Section, you will there find a list of drugs that must bear certain kinds of labels. At the end of this list, you will notice the phraseology: "or any derivative or preparation of any such substances, contained therein." As another example, let us consider opium as defined in the Narcotic Drug Act of the State. Opium includes morphine, codeine and heroin and "any compound, manufacture, salt, derivative, mixture, or preparation of opium." Since, in all of these instances above commented upon, the person framing the statute has been very careful to include compounds, salts, preparations and derivatives, we are at a loss to understand why the statute under consideration should merely say "contains any quantity of barbituric acid, etc." It will readily be seen that this statute is susceptible of the construction that only the specific substances therein named or mixtures of same retaining the original properties are covered by the statute.

From a legal standpoint, it is well established in this State that in construing a penal or criminal statute, everything not fairly within the scope of the language used is to be excluded from its operation. Criminal statutes are to be strictly construed, and it is not the policy of the criminal law to make a person charged with crime the victim of an ambiguity. Such statutes must be construed strictly against the State and in favor of the liberty of the citizen. This is a universal rule of statutory construction applied in all jurisdictions. *EX PARTE PARKER*, 225 N. C. 369; *STATE v. CAMPBELL*, 223 N. C. 828; *STATE v. INGLE*, 214 N. C. 276; *STATE v. HARRIS*, 213 N. C. 758.

We have not, of course, overlooked the proposition that, in a certain sense, it may be said that preparations and compounds of these substances do contain some of the original components; but the chemical change is so great that it does at least create considerable doubt. We do not question nor do we have any uncertainty as to the intent of the person who drafted this statute, but there is a grave question and considerable doubt as to whether or not there is, in this statute, an adequate expression of this

intent within the acceptable standards of certainty which are certainly required in dealing with the liberty of those charged with violations of the criminal law. Certainly an appellate Court would look at this statute with close scrutiny before it would allow the State to budget the liberty of a violator and take out of it the time forfeited to the law.

For these reasons, we are of the opinion that you should not try to enforce this statute by criminal measures and that you should seek amendment to the statute at the next General Assembly in order to clearly and adequately express the prohibitions desired so that there will not be any doubt as to the type of drugs or medicine that must be sold upon written prescription. In the meantime, it seems to us that you can achieve some measure of success by using subsection (f) of Section 106-134. It is noted that this subsection is almost identical with Section 502 of the Federal Food, Drug and Cosmetic Act. This Section in the Federal Law is implemented by detailed regulations, and it seems to us that if you will likewise supplement your own statute that some measure of control can be accomplished.

AGRICULTURE; WEIGHTS AND MEASURES; STANDARDS OF WEIGHTS AND
MEASURES; SPECIFICATIONS AND TOLERANCES AS PROVIDED BY H. 22
OF 1937; APPLICATION TO MILK SOLD IN PAPER PACKAGES
OR CONTAINERS

10 June 1948

You will recall that this office had a consultation with Mr. Pegram and another gentleman from your Department on the question as to whether milk could be sold in paper containers or packages which, as I recall, contain a quantity of ten ounces. It is understood that dairies or milk distributors use these containers, and they are filled with milk by the use of machinery or some mechanical process. When we had our conference, we only had before us two samples of the paper containers and Regulation No. 20 of the Division of Weights and Measures, which deals with milk bottles and fixes certain stated capacities or quantities which such bottles shall be made to hold and prohibiting the sale of milk except in these measures and quantities. We discussed the matter with the Attorney General, and we were of the opinion at that time that these paper containers made for the purpose of holding milk for sale were not within the scope and meaning of Regulation No. 20 which dealt with milk bottles and which ordinarily was understood to mean glass bottles.

It has since been called to our attention, however, that in the administration of Chapter 81 of the General Statutes, the rules or codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards have been adopted and are in force in this State except for certain differences as set forth in Regulation No. 16 of the Division of Weights and Measures; and I might add that these differences or exceptions do not pertain to milk containers. I might call to your attention also that Section 81-8 of the General Statutes provides for a continuous adoption of the weights and measures as received from the United States Standards of Weights and Measures in this State. Regulation No. 16 of the Division of Weights and Measures is authorized by Section 81-2 of the General

Statutes, and this Regulation adopts the rules, regulations, specifications and tolerances for commercial weighing and measuring devices as published in the United States Bureau of Standards Handbook, H. 22, amended by the National Conference on Weights and Measures in 1938, as the official rules, regulations, specifications and tolerances for use in this State, both at the time of the adoption and as the same might be hereafter amended. The National Bureau of Standards Handbook, H. 22, bearing date of 1937, contains the following with reference to milk bottles, as shown on page 33:

"Milk bottles shall be construed to include all glass bottles of the form which has been customarily used for the purpose of the measurement and delivery of milk, cream and buttermilk, at retail, *and also other containers which are employed for this purpose.*" (Italics ours). The above definition, in our opinion, is, therefore, in force in this State

by virtue of Regulation No. 16 of the Division of Weights and Measures; and it follows, therefore, that our first opinion in this matter is not correct. We are, therefore, of the opinion, upon reconsideration of this question, that Regulation No. 20 of the Division of Weights and Measures does include the paper containers of ten-ounce capacity which were inspected by us and that by virtue of Regulation No. 20, only paper containers can be used for the sale of milk which are so constructed and made that they hold and contain the permissible quantities of milk set forth in Regulation No. 20. In other words, those distributors of milk who use the paper containers must sell the milk in the same size container and quantities as is sold in the glass bottles and as prescribed by Regulation No. 20. In this view of the matter, the sale of milk to the quantity of ten ounces in a ten-ounce container is not permissible under Regulation No. 20. You can, of course, amend the Regulation if you think that this is the proper thing to do.

OPINIONS TO THE BUDGET BUREAU

DEPARTMENT OF CONSERVATION AND DEVELOPMENT; DEPOSIT OF GAME AND FISHING LICENSE FEES

5 July 1946

I acknowledge receipt of your letter, in which you call my attention to the amendments made by the 1945 session of the General Assembly to Sections 113-95, 113-144 and 113-145 of the General Statutes, providing for a fee of 50c to be placed in a special fund. You state that it would somewhat simplify the handling of these funds if they could be placed in one special fund, and you inquiry whether or not such procedure may be followed.

While the funds provided for by these three sections are required to be used for somewhat similar purposes, the wording of the use of the funds is not identical in the three sections.

Section 113-95 requires "that fifty cents of the fee received from the sale of each resident State hunting license, each non-resident hunting license, and each State resident hunting and fishing license, as set forth above, shall be set aside as a special fund for the purchase, lease, development, and management of lands and waters in North Carolina, said lands and waters to be used for the propagation of game birds, game animals and fish, and for public hunting and fishing."

Section 113-144 provides for a resident State license for fishing and requires "that fifty cents of this fee shall be set aside as a special fund for the purchase and lease of lands and waters to be developed for the protection and propagation of fish and for the acquisition by lease or purchase of waters for public fishing."

Section 113-145 provides for a non-resident State fishing license and requires "that fifty cents of the non-resident State fishing license fee referred to above shall be set aside as a special fund for the purchase and lease of lands and waters to be developed for the protection and propagation of fish and for the acquisition by lease or purchase of waters for public fishing."

From a reading of these three sections, it appears that there is some slight difference in the purposes for which the fifty cents fee is to be used but I do not think that the difference is such as would require three separate special funds and the intent of these sections will be met if the fees are deposited in one special fund but three separate accounts kept of the funds, so as to separate the fees received from each of the three sections.

EDUCATIONAL INSTITUTIONS; FAYETTEVILLE STATE TEACHERS COLLEGE; NEWBOLD BUILDING; FIRE INSURANCE COVERAGE

19 July 1946

I acknowledge receipt of your letter in which you state that the question comes up from time to time about the fire insurance coverage on a building, or an addition to the Newbold Building, on the campus of the

Fayetteville State Teachers College, and you inquire as to whether or not the college should procure fire insurance coverage on that part of the building situated on a site owned by the Federal Government. As you stated the building is not owned by the State of North Carolina, but belongs to the Federal Government, and was erected and is being occupied by the college by virtue of a contract entered into between the institution and the Federal Government, thus the building is not subject to the 1945 Act creating the State Self-Insurance Fund.

On August 23, 1945, I advised President J. W. Seabrook, of the college, that the college should secure fire insurance coverage on the building to the extent sufficient to take care of the Federal Government's interest and should be secured in the same manner and to the same extent as insurance was secured on the institutions own property prior to the 1945 Act.

It has been suggested from time to time that effort should be made by the institution to acquire from the Federal Government the building and site in question, and sometime during August, 1945, the Council of State suggested that the institution's officials approach the Federal Government in an effort to acquire the property but I have not heard anything further from this suggestion which I conveyed to President Seabrook.

CONFEDERATE WOMEN'S HOME; PERSONS ELIGIBLE FOR ADMISSION

7 November 1946

I received your letter of October 31, stating that Governor Cherry and other members of the Advisory Budget Commission have requested you to obtain an opinion from this office as to who is eligible under the law to be admitted to the Confederate Women's Home at Fayetteville.

G. S. 112-1 provides that the Board of Trustees therein named and their successors, under the name and style of "Confederate Women's Home Association," are created a charitable corporation authorized to establish, maintain and govern "*A home for the deserving wives and widows of North Carolina Confederate soldiers and other worthy dependent women of the Confederacy who are bona fide residents of this State.*"

This is the only provision that establishes the eligibility of persons to this institution, but G. S. 112-2 provides that the Board of Trustees are authorized to prescribe the rules for admission of the inmates and their discharge, and to take whatever action may be desirable in reference to the collection and disbursement of subscriptions, either to the Home or to needy Confederate women elsewhere in the State.

The language of G. S. 112-1 above quoted would limit the persons eligible to admission to the home to deserving wives and widows of North Carolina Confederate soldiers and to other worthy dependent women of the Confederacy who are *bona fide* residents of this State.

There would be no difficulty in construing the phrase "deserving wives and widows." The other phrase, "and other worthy dependent women of the Confederacy," would, in my opinion, mean women who were living in this State during the period of the existence of the Confederacy as *bona fide* residents of this State.

MEDICAL CARE COMMISSION; APPROPRIATION FOR LOCAL HOSPITALS

1 October 1947

I have your letter of September 30, in which you request my opinion as to the availability of the appropriation made by the General Assembly of 1947 for the Medical Care Commission for the construction of medical centers and local hospitals.

You state that this matter has been taken up with the Governor and the Advisory Budget Commission and that they are agreeable to releasing the State money for expenditure for local hospitals, provided the present Federal law authorizing the United States Public Health Service to make contractual obligations with State and with local units for local hospitals will meet the requirements of the State law.

I have noted with care the statement of the Medical Care Commission with reference to this matter, which you enclose to me. You call attention to Section 10 of Chapter 662, which provides that the appropriation shall not be available for expenditure "unless and until the Federal Government has appropriated and provided funds to cover at least one-third of the cost of construction."

Chapter 6A, U.S.C.A. (Cumulative Annual Pocket Part), contains the legislation enacted by Congress for the construction of local hospitals. Section 291d provides as follows:

"In order to assist the States in carrying out the purposes of section 291(b) of this title there is authorized to be appropriated for the fiscal year ending June 30, 1947, and for each of the four succeeding fiscal years, the sum of \$75,000,000 for the construction of public and other nonprofit hospitals; and there are further authorized to be appropriated for such construction the sums provided in section 291g of this title. The sums appropriated pursuant to this section shall be used for making payments to States which have submitted, and had approved by the Surgeon General, State plans for carrying out the purposes of section 291(b) of this title; and for making payments to political subdivisions of, and public or other nonprofit agencies in, such States."

The Labor-Federal Security Appropriation Act of 1948, Chapter 210—Public Laws 165 provides, in part, as follows:

"There shall be allotted to the several States for the fiscal year 1948, as provided in such Act, a sum not exceeding \$75,000,000, a part of the sum authorized to be appropriated for the fiscal year 1948 by part C of the Act. Whenever the Surgeon General shall have approved an application for a construction project in accordance with section 625 of the Act, the Federal share of the cost of such project, as provided by the Act, shall constitute a contractual obligation of the Federal Government: *Provided*, That the aggregate contractual obligation during the fiscal year 1948 shall not exceed \$75,000,000."

The letter from Dr. John A. Ferrell, Executive Secretary of the North Carolina Medical Care Commission, to Governor Cherry and the members of the Advisory Budget Commission, under date of August 18, stated that the United States Public Health Service had advised the Medical Care

Commission on July 10 that of the \$75,000,000 mentioned in the foregoing Act, \$3,431,550 has been allotted to the North Carolina Medical Care Commission for the fiscal year beginning July 1, 1947.

It is my opinion that whenever the Surgeon General has approved an application for the construction of a project in accordance with the law above referred to and has entered into a contractual obligation of the Federal Government to provide from Federal funds one-third of the cost thereof, the provisions of Section 10 of Chapter 662 of the Session Laws of 1947 has been substantially complied with, and that the State, under such circumstances, would be justified in releasing its appropriation made for the purpose of contributing to the cost of such project. The authorized contractual obligation of the Federal Government is, in my opinion, in substance, the equivalent of an appropriation and provision of funds to cover one-third of the cost of construction. Such an obligation on the part of the Federal Government is unconditional and enforceable in the Court of Claims of the United States.

NORTH CAROLINA BURIAL ASSOCIATION; LIMIT ON EXPENDITURES

1 December 1947

I have your letter of November 27, in which you request my opinion as to whether or not the North Carolina Burial Association would be permitted to expend an accumulated surplus for paying rent on space to be used as offices. You state that this expenditure will be in excess of \$31,500 a year, which, under G. S. 58-228, as amended by Section 3 of Chapter 100 of the Session Laws of 1947, is the limit of assessments which can be made on the members of the Association.

I agree with the conclusion which you reached that the limitation of G. S. 58-228, as amended, is a limitation only of the assessments which could be made on the members of the Association in any given year and it is not a limitation on the expenditures which may be made, if funds are otherwise available from a surplus or from any other source.

CONTRACTS; SEWAGE DISPOSAL PLANT; MORRISON TRAINING SCHOOL

16 February 1948

I acknowledge receipt of your letter of February 2 in which you requested a written opinion on the question as to whether or not the contract for the sewage disposal plant at Morrison Training School could be let to a plumbing contractor rather than a general contractor. Mr. Turner of your office discussed this question with me and I understand from him that the low bid was made by a plumbing contractor and that there are not sufficient available funds to meet the low bid made by a general contractor.

While Mr. Turner was in this office, I discussed the question with Mr. Ellington of the office of the North Carolina Licensing Board for Contractors, and he said that he was familiar with the facts in the instant case and that he thought that the contract might be let to the low bidder, a plumbing contractor.

In view of the factual situation in this case and of the statement made by Mr. Ellington, I am of the opinion, that you would be justified in letting the contract in this case to the low bidder even though such bidder is a plumbing contractor rather than a general contractor.

DEPARTMENT OF ARCHIVES AND HISTORY; PROPOSED PURCHASE OF
ORIGINAL CAROLINA CHARTER OF 1663

1 March 1948

I have your letter of February 27, in which you ask my opinion as to whether or not the Department of Archives and History would have a right to purchase the original of the Carolina Charter of 1663 from funds provided from the Contingency and Emergency appropriation in the Biennial Appropriation Act of 1947. I note your comment that you doubt if this would be such an emergency appropriation as would come within the provisions of the statute.

The statute, Chapter 500 of the Session Laws of 1947, provides as follows:

"To provide for contingency and emergency expenditures for any purpose authorized by law for which no specific appropriation is made, or for which inadvertently an insufficient appropriation has been made hereunder. Allotments to be made from this appropriation under the provisions of Section 12 of Article 1 of Chapter 143 of the General Statutes of North Carolina, or of such other statutes as may be applicable . . ."

The Department of Archives and History is authorized by G. S. 121-2 to have collected from files, old newspapers, court records, church records, private collections and elsewhere, data pertaining to the history of North Carolina and the territory included therein from the earliest times.

The Carolina Charter of 1663, of course, does constitute historical data pertaining to the history of North Carolina and the territory included therein from the earliest times and, therefore, if funds were provided by the General Assembly for such purpose, such purchase could be made.

There is, however, nothing in your letter to indicate that such purchase is an emergency one and, in my opinion, the Governor and Council of State would not be authorized to allocate money from the Contingency and Emergency Fund for such purpose. I believe that the purchase, if made, should be authorized by a direct appropriation by the General Assembly.

OPINIONS TO UTILITIES COMMISSION

DOCKET No. 2789; AUTHORITY OF NORTH CAROLINA UTILITIES COMMISSION
TO ENTER AN ORDER REQUIRING THE NAMED CARRIERS TO MAKE
REFUNDS OF OVERCHARGES OF INTRASTATE PASSENGER FARES

2 December 1946

You have referred to me for an opinion the question involved under the foregoing Docket No. 2789, as to the right of your Commission to require the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers), the Seaboard Air Line Railroad Company, successor corporation, and the Southern Railway Company, to make refunds to persons entitled thereto for overcharges for intrastate coach fares for the period beginning on August 1, 1944, and ending on July 25, 1945, including such dates. Your Commission has given notice to the carriers mentioned of its purpose to enter an order with respect to this matter, which, omitting the caption, is as follows:

"It appearing from the record herein that Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers), and Southern Railway Company, original petitioners in this proceeding, did overcharge passengers who paid and bore unlawful intrastate coach fares for the period August 1, 1944, to July 25, 1945, inclusive; and

"It further appearing that the Seaboard Air Line Railroad Company has succeeded to the operating assets and liabilities of the Seaboard Air Line Railway Company; and

"It further appearing that the unlawfulness of the intrastate fares within the aforesaid period was established by judgment in the District Court of the United States for the Eastern District of North Carolina pursuant to mandate of the Supreme Court of the United States in No. 560, NORTH CAROLINA vs. UNITED STATES, 325 U. S. 507. Good cause appearing therefor;

"IT IS ORDERED, That each of the following respondents: Atlantic Coast Line Railroad Company, Southern Railway Company, Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers), and Seaboard Air Line Railroad Company, successor corporation, be, and the same are hereby directed to pay to each of the parties to whom such payments are due, any and all overcharges for intrastate passenger fares which were collected between the first day of August 1944, and the twenty-fifth day of July 1945."

In response to the notice given to the carriers, a hearing was had on October 18, 1946, before your Commission, at which time the carriers mentioned were represented by counsel as appears of record.

An answer was filed by the Southern Railway Company in which was included a challenge to the jurisdiction of the Commission to enter the order proposed in this cause, and in which it was also stated that without waiving its motion to dismiss for lack of jurisdiction on the part of the Commission, the position was taken that the intrastate passenger fares collected for the period mentioned were the legal and valid intrastate fares which in law they were compelled to collect.

It was also urged that because the Norfolk and Western Railway Company was not required to make such refunds an unlawful discrimination would result.

A joint answer was filed by the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company, and the receivers of the Seaboard Air Line Railway Company, in which also the position was taken that the Commission was without jurisdiction to issue the proposed order; that there was no proceeding pending before the Commission in which the proposed order could be issued; that the intrastate fares collected by the carriers, from August 1, 1944, to July 25, 1945, under an order of the Interstate Commerce Commission, were legal and valid fares and did not constitute illegal overcharges; that the rights of an intrastate passenger to recover on account of such charges could be determined only by a court of competent jurisdiction; that the proposed order was void for indefiniteness and, if valid, would prevent the carrier from setting up any valid defense it might have to the payment.

AUTHORITY OF UTILITIES COMMISSION TO ENTER THE PROPOSED ORDER OR ONE SUBSTANTIALLY SIMILAR THERETO

General Statutes 62-27 provides as follows:

"General powers of commission.—The Utilities Commission shall have general power and control over the public utilities and public service corporations of the state, and such supervision as may be necessary to carry into full force and effect the laws regulating the companies, corporations, partnerships, and individuals hereinafter referred to, and to fix and regulate the rates charged the public for service, and to require such efficient service to be given as may be reasonably necessary."

General Statutes 62-29 provides as follows:

"Express and implied powers.—The Utilities Commission shall also have, exercise, and perform all the functions, powers, and duties and have all the responsibilities conferred by this article, and all such other powers and duties as may be necessary or incident to the proper discharge of the duties of its office."

General Statutes 62-30 provides, in part, as follows:

"Supervisory powers.—Under the rules and regulations herein prescribed and subject to the limitations hereinafter set forth, the said Utilities Commission shall have general supervision over the rates charged and the service given, as follows, to wit:

"(1) By railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers;

"...
"And the said Utilities Commissioner is hereby vested under this section with all power necessary to require and compel any public utility or publicservice corporation of the kinds herein designated or any other class of public utility to provide and furnish to the citizens of this state reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made to the citizens of the state who may be entitled to use the same under such rules and regulations as may be lawfully prescribed."

The constitutionality of the sections of the General Statutes above quoted is fully sustained in the numerous cases cited in the annotations under these sections.

While apparently conceding this general supervisory power of the Commission over the carriers, respondents contend in the answer filed that the Commission has no jurisdiction or authority to issue an order requiring respondents to refund amounts of the overcharges referred to, or to enforce the order if issued, and cite in support of their position the case of *NORTH CAROLINA CORPORATION COMMISSION v. SOUTHERN RAILWAY*, 147 N. C. 483.

This case was decided in 1908 and many years prior to the amendment to the statute which specifically gives the Utilities Commission the authority to compel and require compliance with the regulations and charges fixed by it according to law and the final determination thereof, as fixed under the provisions of Article 3 of Chapter 62 of the General Statutes.

General Statutes 62-31, which was originally enacted by Section 16 of Chapter 134, Public Laws of 1933, was subsequently amended in 1937 and 1939 and now reads as follows:

"Commission to keep itself informed as to utilities.—The said Utilities Commission shall at all times be required to keep itself informed as to the public-service corporations hereinbefore specified and enumerated, their rates and charges for service, and the service supplied to the citizens of the state and purposes therefor; and it shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the state, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and no corporation, association, partnership, or individual, other than carriers of passengers and property by rail, express, highway and/or water, doing business in the State of North Carolina as a public-service corporation, or any other corporation herein designated, shall be allowed to increase its rate and charge for service, or change its classification in any manner whatsoever except upon petition duly filed with the Utilities Commission and inquiry held thereon and final determination of the reasonableness and the necessity of any such increase or change in classification or service: Provided, however, that nothing herein shall be construed to prevent any public-service corporation under the jurisdiction of the commission from reducing its rates, either directly or by change in classification." (Italic supplied).

The italic portion of the above quoted section specifically authorizes and empowers the Commission to make inquiry into such rates and charges in behalf of the citizens of the State, and compel and require compliance with the regulations and charges, and final determination is fixed therefor under the provisions of the article in which such section appears.

The enactment of this section in 1933 furnished the Commission with the authority which was lacking at the time of the decision in the case of *HARDWARE COMPANY v. RAILROAD*, relied upon by the carriers. No constitutional challenge of the provisions of this section is presented and the authority of the Commission to make the contemplated order, or one substantially similar thereto, is fully supported by the language of the section.

In addition to the statutory provisions above quoted, G. S. 116-25 provides, in part, as follows:

"Rebates and returns of overcharges due by utility companies, which have not been paid to or claimed by the persons to whom they are due within a period of two years from the time they are due or from the time any refund was ordered by any court *or by the Utilities Commission*, shall be paid to the University of North Carolina." (Italics supplied).

This section was enacted by Chapter 22 of the Public Laws of 1939 and provides additional authority for the Utilities Commission to order a refund of overcharges of intrastate passenger fares, as shown by the language italicized, which italicizing is supplied by me. This section very definitely contemplates that the Utilities Commission shall make an order directing a utility to make a return of overcharges to persons "to whom they are due" in default of which the overcharges made escheat to the University of North Carolina.

In addition to the authority above cited, it may be considered that the proposed order of the Utilities Commission, or some other order carrying out the intended purpose, might be authorized by the authority of the Commission over utility companies, provided by G. S. 62-33, which reads as follows:

"The Utilities Commission may establish a system of accounts to be kept by the public utilities, under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept."

This regulatory authority given the Commission over a system of accounts to be kept by the Utilities Commission might be considered as authority to make, in this cause, an order requiring the carriers to set up on their books and records the reserves necessary to refund the overcharges collected on intrastate rates during the period in question, in order that a true picture of the financial situation of the carriers might be shown. This might also be important to the carriers in establishing their liability for Federal and State income taxes during the period under consideration.

The several statutes cited and quoted, in my opinion, are sufficient to authorize the Utilities Commission to enter the order which is in contemplation in this case. It is to be observed, however, that the order contemplated does not attempt to and does not fix any definite liability of any particular carrier to any one for any specific overcharge of intrastate fares. It only proposes to require that the refunds shall be made to the persons entitled thereto. The order may well include a provision that, in the event the carriers should fail to make the refund to any person entitled thereto, such person would have a right to maintain an action for the recovery thereof in any court of competent jurisdiction. The proposed order is not in any sense a definite money judgment for any specified sums to any particular persons, but is merely a direction and requirement that the carriers shall make a refund and "pay to each of the parties to whom such payments are due any and all overcharges for intrastate passenger fares which were collected between the first day of August 1944, and the twenty-fifth day of July 1945."

In the event the carriers should in any instance fail or refuse to pay the overcharge to the person entitled thereto, obviously the remedy of the person aggrieved would be to institute an action in any court of competent jurisdiction to recover the amount due thereon. The Commission does not in any sense attempt to pass upon the exact amount of any refund, or to defeat any claim which the carrier may have a right to set up against it.

THE CHARGES MADE BY THE CARRIERS FOR INTRASTATE PASSENGER FARES DURING THE PERIOD IN QUESTION WERE UNAUTHORIZED AND ILLEGAL.

The carriers, in the answer filed by them, take the position that the intrastate fares collected by them during the period from August 1, 1944, to July 25, 1945, both dates inclusive, were collected by reason of an order of the Interstate Commerce Commission, which order was upheld by the Federal District Court for the Eastern District of North Carolina, and that they were compelled to rely upon the order of the Interstate Commerce Commission and that, therefore, the charges made during said period of 2.2 cents per mile were legal charges and that no refund is due to anyone by reason thereof.

The carriers cite in support of their position the case of ATLANTIC COAST LINE RAILROAD COMPANY v. FLORIDA, 295 U.S. 301 79 L. ed. 1451. The facts in this case, as stated by Mr. Justice Cardozo in the majority opinion, were that freight charges were collected by a railroad carrier in accordance with an order of the Interstate Commerce Commission after the refusal of a United States District Court to declare the order void. Later the decree was reversed by the Supreme Court of the United States on the ground that the findings of the Commission were incomplete and inadequate. Still later the Commission, upon new evidence and new findings, made the same order it had made before, which was confirmed by the Supreme Court of the United States after appropriate proceedings. The question involved, as stated by the Justice, was whether restitution was owing from the carrier for the whole or any part of the rates collected from its customers while the first order was in force. The full facts with reference to this matter were stated in amplification of the narrative by the Court.

The rule applicable to this situation was stated by the Court as follows:

"Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Mill. Co. v. St. Louis S. W. R. Co.* supra; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 101, 42 S. Ct. 2; cf. *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. 588, 28 Am. St. Rep. 589. Indeed, the concept of compulsion has been extended to cases where the error of the decree was one of inaction rather than action, as where a court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy. *Baltimore & O. R. Co. v. United States*, 279 U. S. 781, 73 L. ed. 954, 49 S. Ct. 492, supra. *But the rule, even though general in its application, is not without exceptions.* A cause of action for restitution is a type of the broader cause of action for money had

and received, a remedy which is equitable in origin and function. *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Reprint, 676; *Bize v. Dickason*, 1 T. R. 285, 99 Eng. Reprint, 1097; *Farmer v. Arundel*, 2 Wm. Bl. 824, 96 Eng. Reprint, 485; *Kingston Bank v. Eltinge*, 66 N. Y. 625. The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. *Schank v. Schuchman*, 212 N. Y. 352, 358, 359, 106 N. E. 127; *Western Assurance Co. v. Towle*, 65 Wis. 247, 26 N. W. 104. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. Cf. *Tiffany v. Boatman's Sav. Inst.* 18 Wall. 375, 385, 390, 21 L. ed. 868, 870, 871." (Italics supplied.)

The opinion then reaches the conclusion that it would be inequitable and unjust to require the carrier to refund the rates charged under order of the Interstate Commerce Commission, and, in effect, adopts the finding of the master that during the period that the charges were made, there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct, and that if the processes of the law had been instantaneous and adequate, the attempt at correction would not have missed the mark; that it was foiled through imperfections of form, through slips of procedure as the sequel of events had shown them to be. The Court pointed out that unjust discrimination against interstate commerce was "forbidden" by the statute and there "declared to be unlawful."

By reason of the equities so found to exist against the right of the plaintiff to recover the overcharges, the Court refused to lend its hand in enforcing the claimant's legal right to recover.

The dissenting opinion of Mr. Justice Roberts, in which the Chief Justice, Mr. Justice Brandeis, and Mr. Justice Stone concurred, very convincingly took the position that the overcharges made by the carrier under order of the Interstate Commerce Commission and in accordance with an order of the District Court, reversed on appeal to the Supreme Court of the United States, were illegal and unauthorized and that the claimants had a clear legal right to recover. In concluding the dissenting opinion, it is said:

"To hold that the claimants may not have restitution is to say that invalid, void or voidable orders of the Commission have precisely the same force and effect as orders lawfully made, if from extrinsic facts and matters not cognizable by the court the conclusion may be drawn that the Commission might have made a valid order in the circumstances. So to hold is to recognize in a restitution proceeding, a jurisdiction which in no other circumstances and in no other case could a federal court exercise; and to permit that court to ignore and nullify action in a field within the State's sovereign power."

There is a very obvious difference between the case of the ATLANTIC COAST LINE RAILROAD COMPANY v. FLORIDA and the case of NORTH CAROLINA v. UNITED STATES, 325, U. S. 507, 89 L. ed. 1761. In the opinion in the case of NORTH CAROLINA v. UNITED STATES, Mr. Justice Black states the facts for the Court and says that the North Carolina State Utilities Commission brought a suit to enjoin enforcement

of an order of the Interstate Commerce Commission in the Federal District 3-Judge Court and that the case was being heard on direct appeal from the refusal of the District Court to restrain the enforcement of the order of the Interstate Commerce Commission, the two Commissions, the State and Federal, each claiming paramount power to fix railroad rates in North Carolina. The North Carolina Commission ordered railroads doing business in the State to charge no more than 1.65 cents per mile for carrying intrastate coach passengers from one point in the State to another. The Interstate Commerce Commission authorized the same railroads to charge 2.2 cents per mile for the same type of carriage.

The crucial question involved in these contentions, as stated by the Court, is whether the indispensable prerequisites to the exercise of the Federal Commission's power over intrastate rates had been shown to exist to a sufficient certainty. The Court states that the State's power over intrastate rates is exclusive up to the point where its action would bring about prejudice or discrimination, prohibited by Section 13 (4) of the Interstate Commerce Commission Act. The Court further states that intrastate transportation is primarily the concern of the State and that the power of the interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which unjustly affect interstate transportation. The Court points out that the order of the Interstate Commerce Commission would have been valid if supported by evidence, but says:

"Neither in its formal findings nor in its discussion of the facts did the Commission indicate that the North Carolina rates here involved were less than compensatory or insufficient to cover the full cost of service. Nor did they find that the maintenance of these rates was necessary to the operation of a nationally efficient and adequate railway system.

"... The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. . . ."

In the opinion of the Court, it is further stated:

"There was evidence offered by the railroads, which indicated that their 1942 per mile net cost of carrying coach passengers was under or about 1 cent. The Commission had found facts in the 1936 report, 214 Inters Com Rep (F) at pp 216, 266, which indicated a mileage coach passenger cost of 3.25 cents. Evidence of the four railroads also showed their average revenue increase since 1936 had been approximately 250%. This great revenue increase transformed a 1936 \$16,426.00 deficit of six North Carolina roads, including the four here involved, into a 1942 \$26,699,988.00 profit. Most of this increased profit was shown to have been derived from passenger revenues.

"All of this evidence and much more to which we might advert was sufficient to show that the Commission might have found, had it made any findings on the subject at all, that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently. But it made no findings on this subject at all. The pur-

pose of the National Transportation Law is to assure railroads a fair net operating income and no more. *Dayton-Goose Creek R. Co. v. United States*, 263 U S 456, 68 L. ed. 388, 44 S Ct 169, 33 ALR 472. The power of the Commission to require states to raise their intra-state rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intra-state. *United States v. Louisiana*, 290 US 70, 75, 78 L. ed. 181, 185, 54 S Ct 28. But the Commission cannot 'require intra-state rates to be raised above a reasonable level.' *United States v. Louisiana*, *supra* (290 US 78, 78 L ed 181, 54 S Ct 28)."

The opinion concludes:

"Because the order of the Commission was not based on adequate findings, supported by evidence, *the District Court should have declined to enforce its order. The judgment of the District Court is reversed.*" (Italics supplied).

There have been no subsequent hearings and findings of fact by the Interstate Commerce Commission justifying the charging of the higher rates, as was done in the FLORIDA case. All the equities which are shown to exist appear to be in favor of the North Carolina passengers who had been forced to pay under a void order of the Interstate Commerce Commission intrastate fares of 2.2 cents, in disregard of a valid and existing order of the North Carolina Utilities Commission having in effect fares of 1.65 cents. The case, therefore, in my opinion, clearly falls within the rule stated by Mr. Justice Cardozo in the FLORIDA case, and there is nothing in the facts in this case to bring it within the exception to the rule and provide any basis for the Court, in the exercise of equitable jurisdiction, to refuse to lend its hand in the enforcement of the clear legal right of passengers to recover the excess charges made by the carriers.

THE PROPOSED ORDER OF THE COMMISSION IS NOT VOID FOR UNCERTAINTY OR BECAUSE OF ANY DISCRIMINATION BETWEEN CARRIERS OPERATING WITHIN THIS STATE.

The carriers in their answer assert that the proposed order is void for indefiniteness and that the order would be discriminatory, as no order was made affecting the fares collected by the Norfolk and Western Railroad Company.

The Norfolk and Western Railroad Company was not a party to this proceeding, as it was originally constituted, and it has since not been made any party to it. Of all of the carriers who were parties to the proceeding before the Commission, made subject to the proposed order, nothing has been done by the Utilities Commission which would in any way validate any overcharges which were made by the Norfolk and Western Railroad Company, or any other interstate carrier. Any overcharges made by them during the period under the void order of the Interstate Commerce Commission would constitute overcharges for which the passengers would be entitled to be repaid, to the same extent and in the same manner as other carriers. The Norfolk and Western Railroad Company having an incon-

sequential interest in the questions involved did not come into the proceeding and make an attempt to litigate the questions which were involved. In my opinion, there has not been and cannot be any discrimination affecting the carriers involved in this proceeding which would have anything to do with the validity of the proposed order.

As was pointed out earlier in this opinion, the proposed order of the Commission does not attempt to determine the persons from whom overcharges have been collected or to determine the amounts thereof, or the defense, if any, the carriers might assert against such claims. The Commission proposes only to exercise its supervisory powers over the carriers and to direct that, upon proper proof being made, just claims for overcharges shall be paid to persons entitled thereto. If the carriers have any counterclaim or set-off against the payment of any claim for refund which shall be made by any passenger, the order would not prevent such claim being asserted.

For the reasons stated, I am of the opinion that the proposed order of the North Carolina Utilities Commission in this matter was authorized by law and is one which the Commission has complete authority to make, the carriers having filed statements with the Commission admitting that during the period involved they collected fares at the rate of 2.2 cents per mile, which would amount to the total sum of \$551,196.00 in excess of fares at the rate of 1.65 cents fixed and declared by the North Carolina Utilities Commission. To be allowed to retain these overcharges would, in my opinion, be unjust enrichment and in violation of the orders of the North Carolina Utilities Commission which have been held valid and legal by the Supreme Court of the United States.

DOCKET No. 2789; AUTHORITY OF NORTH CAROLINA UTILITIES COMMISSION
TO ENTER AN ORDER REQUIRING THE NAMED CARRIERS TO MAKE
REFUNDS OF OVERCHARGES OF INTRASTATE PASSENGER FARES

31 March 1947

As requested by you, I have given further and detailed consideration to the answers filed by the Atlantic Coast Line Railroad Company, the Southern Railway Company, the Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers), and the Seaboard Air Line Railroad Company.

It would perhaps serve no good purpose to attempt, in detail, to analyze the answers filed by the carriers. While the answer of the Atlantic Coast Line Railroad Company goes into great detail in presenting the position of this carrier, I do not find anything which would throw any additional light upon the question which is being considered. It consists mainly in an answer to the opinion which was furnished by me to the Commission under date of December 2, 1946. The only thing which they bring out which had not been previously considered is set out on pages 24, 25 and 26 of the answer of the Atlantic Coast Line Railroad Company, in which they refer to and quote an opinion of the Commission dated July 8, 1943, as follows:

"Undoubtedly petitioners' desire to drastically increase their intrastate civilian coach fares is solely for the purpose of bringing such fares to the level of the corresponding interstate fares. We have care-

fully examined the evidence which of necessity perhaps is largely related to the results of interstate operations, and upon that evidence we are persuaded that present intrastate coach fares should not be increased to the full extent sought, *but that some degree of increase has been justified*, the precise extent of which may not be properly determined without fully investigating the lawfulness of interstate coach fares in the Southern Region under existing conditions, both as to the reasonableness of the basic one-way coach rate for civilian travel of 2.2 cents per mile, and the lawfulness of the relation of that fare to the round-trip basis of 180 per cent of the one-way fare, as well as any other distinctions in coach fares which have not had affirmative approval of the Interstate Commerce Commission on a recent record devoted to these issues."

They also quote the Commission's opinion, in part, as follows:

"It is further ordered, With respect to increases as proposed by petitioners in one-way and round-trip civilian coach fares, that a determination of the precise extent to which such fares may be lawfully increased, be and the said determination is hereby deferred until the administrative remedy referred to in the foregoing report has been exhausted."

Obviously, the carrier is attempting to obtain all the advantage of the full increase of the coach fares for which they had applied, without any increase whatever having actually been allowed, and put into effect by the Commission. If the carriers had pursued the matter further and had been successful in securing "some degree of increase," that would not have satisfied them at all, as they were insisting on their demands that the rate be drastically increased to the level of their interstate fares, as stated by the Commission. The statement, therefore, of the Commission indicating that some degree of increase has been justified, the precise extent of which could not be determined without investigating the lawfulness of interstate coach fares under existing conditions, amounted to nothing more than a statement of the willingness of the Commission to consider the matter further if properly pursued, which was never done.

It is my considered opinion that the proposed order of the Commission is fully authorized by law and the authorities controlling the action of the Commission.

MUNICIPALITIES; UTILITIES COMMISSION; GRANTING FRANCHISES
TO BUS COMPANIES

10 June 1947

I received your letter of June 6, enclosing a copy of your letter of May 31 to Honorable M. V. Barnhill, the letter to Judge Barnhill being as follows:

"We are having many questions to arise as a result of the decision of the Court in City Coach Company vs. Gastonia Transit Company, which was recently handed down and in which you wrote the opinion of the Court.

"One question presented to us is as follows: The White Transportation Company, Inc. of Asheville, N. C., holds a franchise certificate No. 606 from this Commission which provides for:

"1. 'Transportation of passengers over the streets of the city of Asheville, subject to the right of the municipal authorities of Asheville to designate such schedules, routes and stops, and such other necessary police regulations as it may be necessary to promote safety of operation and to relieve the congestion on the streets.'

"2. To operate 'over such streets and highways outside of the city limits and within one mile thereof as may be approved by the Commission and by the city of Asheville.'

"Is the authorization above quoted a sufficient compliance with the decision in City Coach Company vs. Gastonia Transit Company or will this Commission have to designate the streets, fix the schedules and name the stops within the city of Asheville over which the buses operate?

"We have several other franchises wherein the authority is practically identical with that quoted for the White Transportation Company."

In the first place, I think it would be desirable to know whether or not there is any provision in the charter of the City of Asheville which would authorize the City to grant franchises to buses operating within the City and within one mile of the corporate limits. I think this information could be obtained from the City Attorney. It would be difficult for us to check out the numerous Acts relating to the City of Asheville to obtain this information. It might be that the Asheville charter contains provisions similar to those found in the charter of the City of Hickory which gave that City authority to grant franchises to public utilities, including motor buses operating in the City, and if such is the case the jurisdiction would be local rather than in the Utilities Commission, under the decision above referred to.

In your letter to Justice Barnhill you inquire as to whether or not the provisions in the franchise certificate No. 606 to the White Transportation Company, Inc., of Asheville, would be a sufficient compliance with the decision in the case of CITY COACH COMPANY v. GASTONIA TRANSIT COMPANY, 227 N. C. 391.

The provisions of the franchise certificate being subject to the right of the municipal authorities at Asheville to designate routes, schedules and stops and other necessary police regulations as may be necessary, would be a delegation of the authority imposed by law upon the Utilities Commission under Article 6 of Chapter 62 of the General Statutes, since by the decision in the recent case it is held that the Commission has jurisdiction over such operations in cities and towns. The regulatory powers of the Commission are set out in G. S. 62-109 with which, of course, you are thoroughly familiar.

I believe it would be desirable to change at least the form in which the matter is handled if the Commission has jurisdiction within a municipality such as Asheville. I think that you could act upon the recommendation and adopt the findings of the municipal authorities, making them your own after such investigation as you care to make, which would avoid the fault of delegating authority given by law to your Commission to the municipal authorities.

MOTOR BUS CARRIERS; FRANCHISE; MUNICIPAL TAXATION;
TAX CANNOT BE INCREASED

12 September 1947

I have your letter of September 11, enclosing a letter from Mr. Ralph H. Ramsey, Jr., under date of September 8, in which Mr. Ramsey asks whether or not a town has a right to place any privilege or franchise tax on such motor buses as are operated within the town.

G. S. 105-116, providing for franchise or privilege tax on street buses and similar street transportation systems for the transportation of freight or passengers, provides in subsection (6) that no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is "now imposed" by any such city or town. This enactment was taken from Chapter 158, Section 203, of the Public Laws of 1939 and the phrase "now imposed" would have reference to the date of the ratification of that Act.

Therefore, under this statute, a municipality could not impose any franchise license taxes on the bus companies for operating within the corporate limits of a municipality, except that which was imposed in 1939.

MOTOR VEHICLES; UTILITIES COMMISSION; U-DRIVE-IT TRUCKS;
NORTH CAROLINA TRUCK ACT OF 1947

18 September 1947

I have your letter of September 9, 1947, in which you request my opinion as to the effect of the North Carolina Truck Act of 1947 on a person engaged in the business of renting trucks on a U-Drive-It basis. You inquire specifically if the North Carolina Truck Act of 1947 prohibits a person from engaging in the business of leasing trucks on a U-Drive-It basis. The facts upon which you request my opinion are as follows:

The Drive It Yourself, Inc., (hereinafter called company) owns several automobiles and a few trucks which it rents out to individuals desiring to use the same. Upon renting a vehicle all control over and supervision of the operation of the vehicle is relinquished by the company. The person who rents the vehicle furnishes the driver and uses the vehicle as he sees fit. For the use of the vehicle the renter pays a fee which is determined by the number of miles the vehicle is operated plus an additional daily sum.

The North Carolina Truck Act of 1947 does not purport to prohibit the operation of any business. It merely contains a grant of authority to the Utilities Commission to require that certain businesses be operated in certain specified ways. Thus, if the operations of the company are not covered by the Truck Act, there is nothing therein which prohibits the conduct of such a business.

By Section 5 of the Truck Act the Utilities Commission is given authority to supervise and regulate common carriers by motor vehicle, contract carriers and motor carriers. A contract carrier is defined by Section 3, subsection (15) as a person who carries by motor vehicle in intrastate commerce under individual contracts or agreements property for compensation.

A common carrier is defined by Section 3, subsection (14) as any person who holds himself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property for compensa-

tion. Motor carrier as defined by subsection (16) of this same section includes both of the above definitions. Unless the business of the company is such as to bring it within one of the above definitions the Utilities Commission has no power or control over it.

I am of the opinion that the activities of the company do not make it either a common carrier, contract carrier or a motor carrier. The company does not hold itself out as a carrier of property. It advertises only that it will rent vehicles which may be used as the renter or lessee sees fit. It furnishes no drivers and exercises no control over the vehicles while they are being used by the renter or lessee. This to my mind does not constitute the company a carrier within the meaning of Section 3.

I, therefore, advise that in my opinion as long as the company conducts its business in the manner outlined above the provisions of the North Carolina Truck Act of 1947 will have no application thereto.

OPINIONS TO INSURANCE COMMISSIONER

MINORS; CONVEYANCES BY MINOR SERVICE MEN AND WIVES LIMITED TO BENEFITS OF G. I. BILL OF RIGHTS

5 August 1946

Mr. J. F. Stevens, Executive Vice-President of the Gate City Savings & Loan Association, inquired through your office as to whether or not a veteran and his minor wife may mortgage or convey property owned by them by an estate of entirety.

Chapter 770 and 771 of the Session Laws of 1945 covers the questions raised by Mr. Stevens. General Statutes 165-14 reads as follows:

"This article applies to every person, either male or female, eighteen years of age or over, but under twenty-one years of age, who is, or who may become, entitled to any rights or benefits under the servicemen's readjustment act."

And Section 165-17, which deals with minor spouses of veterans, reads as follows:

"For the purposes of this article, the term "veteran" means any person who is entitled to any benefits or rights under the laws of the United States or any rules, regulations or directives issued pursuant thereto by reason of service in the armed forces of the United States during any war in which the United States has engaged."

Section 165-18 of the General Statutes limits the authority of a minor spouse to making conveyances necessary to obtain the benefits of the so called Bill of Rights. The pertinent portion of this section reads as follows:

"Any person under the age of twenty-one years who is the husband or wife of a veteran, is hereby authorized and empowered in his or her own name, and without any order of court or the intervention of a guardian or trustee, to execute any and all contracts, conveyances, and instruments, to take title to property, to defend any action at law, and to do all other acts necessary to make fully available to such veteran, his or her family or dependents, all rights and benefits under the servicemen's readjustment act of one thousand nine hundred and forty-four, or other statutes enacted in the interest of veterans, their families or dependents, and all laws, rules and regulations amendatory or supplemental thereto, in as full and ample manner as if such minor husband or wife of such veteran had attained the age of twenty-one years."

In my opinion, the power vested in minor spouses to join the execution of conveyances of real property is limited to such conveyances as are necessary to enable the veteran or members of his family to obtain the benefits of the Servicemen's Readjustment Act. If the proposed conveyance by a minor spouse to the Gate City Savings & Loan Association is to obtain funds from the Association, to be secured by a mortgage, I think

it would be necessary for the usual court order to be obtained in order to make such conveyances valid as to the minor spouse. But if the conveyance is made to obtain a loan under the provisions of the Servicemen's Readjustment Act, I think that a minor spouse may join in the execution of the conveyance without order of court.

INSURANCE LAWS; APPROVAL OF FORMS

26 August 1946

In your letter of the 23rd of August, 1946, you inquire if under Section 54 of Chapter 58, General Statutes of this State, if it is a requirement of the law that the Insurance Commissioner approve forms for policies of insurance for each individual insurance company doing business in this State, or if the requirements of the law would be met if a bureau or other rating organizations file one set of all policy and endorsement forms for its member companies.

The Act which requires the approval of such forms by the Insurance Commissioner is as follows:

"Forms to be approved by commissioner of insurance.—It is unlawful for any insurance company doing business in this state to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the commissioner of insurance in North Carolina, and copies filed in the insurance department."

It does not appear that there is a legal question raised in this letter, but that this is an administrative matter which it seems to me is one for administrative determination by you. No legal objection is seen to the approval of such forms in the manner suggested in the last paragraph of your letter.

INSURANCE; FRATERNAL SOCIETIES; FEES

20 September 1946

I acknowledge receipt of your letter in which you state that your department charges a foreign insurance company a fee of one dollar for the filing of either charter or by-laws, or an amendment to a charter or by-law, and that the same charges have been made against fraternal societies licensed to transact business in this State. You further state that the Modern Woodmen of America has questioned your authority to charge a fee of one dollar for the filing of a certified copy of its amended by-laws.

You inquire as to your duty in requiring the Modern Woodmen of America and other fraternal societies to pay the fee of one dollar for the filing of amendments to by-laws, etc.

Article 28 of Chapter 58 of the General Statutes, dealing with fraternal orders and societies, Section 58-265, contains the following:

"Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the

provisions of all general insurance laws of this state, and no law hereafter passed shall apply to such societies unless fraternal orders or societies are designated therein."

Therefore, any statute imposing a fee on fraternal orders or societies would have to make specific reference to such orders or societies.

Section 58-63, which you rely upon for authority for charging a fee for filing amendments to by-laws, makes no reference to fraternal orders or societies except that a fee of twenty-five dollars (\$25) shall be collected "for filing charters and other papers of a fraternal order, preliminary to admission."

Therefore, it seems to me that the only charge that you may assess against a fraternal order or society is a fee of twenty-five dollars (\$25) for filing the charter and any and all other papers necessary, preliminary to admission, and that no charge can be made after such fraternal order or society has been admitted to do business in the State.

INSURANCE; TITLE INSURANCE; EXAMINATION FEE REQUIRED

20 September 1946

I acknowledge receipt of your letter in which you state that the Commercial Standard Insurance Company of Texas has been licensed to do business in the State of North Carolina, to write exclusively title insurance, and proposes to write such insurance through licensed attorneys of the State. You further state that you have decided to accept certificates of membership in the North Carolina Bar Association from attorneys desiring to represent said company in lieu of a written examination, but that you feel that such attorneys are required to pay the ten-dollar examination fee provided for in Section 105-228. 7 of the General Statutes. You inquire as to the correctness of your opinion.

I assume that there is no question but that the attorney representing the Commercial Standard Insurance Company of Texas engages in the solicitation of business and otherwise falls within the classification of a special or district agent, manager, or organizer, general agent, local canvassing agent, resident or non-resident adjuster, or non-resident broker.

If my assumption is correct, I agree with you that in view of the language of Section 105-228.7, the examination fee of ten dollars should not be waived.

TAXATION; INSURANCE COMPANIES; PREMIUM TAXES; DEPOSITS TO COVER COST OF INSURANCE; RETURN OF UNUSED PORTION OF DEPOSITS; DEDUCTIBILITY OF PORTION OF DEPOSIT RETURNED

2 October 1946

You have requested me to advise you as to the proper method of computing the amount of the gross premium tax due by the Factory Mutuals Group of Insurance Companies (hereinafter referred to as taxpayer) to the State of North Carolina. Your specific inquiry is whether taxpayer is required under G. S. 105-228.5 to pay the premium tax on the total

amount of deposits received without deducting the unused portion of the deposits returned to the insured, or whether the tax is due only on the amount of the deposit used or not returned to the insured.

Taxpayer is engaged in the business of insuring special types or classes of risks. No fixed charge for, or cost of, insurance is stated by taxpayer. The cost of insurance is determined by the losses sustained by persons, corporations, etc., insured and the expenses incurred by the insurer. This cost of insurance is determined at stated intervals *after* the protection commences, and not at the time the insurance becomes effective. The method of operation of these companies is stated as follows in a memorandum filed with me:

"The Factory Mutual Companies operate on the 'Premium Deposit Plan.' In other words, at the beginning of the policy term, they require that each member make a premium deposit which varies for the different types of risks, but which, for a given risk, is the same for all terms — that is, the same premium deposit is charged for a six-months' policy as for a three-year policy. Out of the original premium deposit the actual cost of carrying the insurance is taken each month during the life of the policy. Each premium deposit is charged with its pro rata share of all expenses and losses and contributions to reserves and is then credited with its pro rata share of all investment income. The unused or unabsorbed balance of the initial premium deposit is returned to the policyholder at the expiration of the policy as a return of unabsorbed premium deposit (so-called Dividend)."

This deposit remains the property of the depositor, and the insurer has only the right to draw against the deposit to the extent of the cost of the insurance.

The taxpayer operates under the provisions of G. S. 58-131.4. This section specifically authorizes an insurer to engage in the business of insuring special types or classes of risks on a deposit basis. Thus, instead of filing a schedule of premium charges with the Rating Bureau, taxpayer files with that Bureau a schedule of deposits required. The deposits required are in most instances approximately ten times as great as the cost of insurance.

G. S. 105-228.5 provides that every insurance company shall annually pay to the Commissioner of Insurance a tax measured by gross premiums. This section provides further that the amount of the gross premiums shall be determined on the basis of the gross premiums as provided in the policy contracts, with no deduction for dividends, and with no other deduction, except for return of premiums, *deposits*, fees, or assessments for adjustment of policy rates, or for cancellation or surrender of policies, excluding cash surrender values. This section specifically authorizes a deduction for the return of deposits in determining the gross premiums upon which the tax shall be paid. I am of the opinion, therefore, that the taxpayer's liability should be computed only on the amount of the deposits used or not returned to the insured. The amount of the deposits returned to the insured or unused by the company should not be considered in computing the tax.

This opinion should not be construed as authorizing mutual insurance companies, having fixed rates which are payable in advance, to deduct from their gross premiums dividends which are paid to stockholders or persons

insured. The distinction between deposits as required by the taxpayer and premiums paid to mutual insurance companies seems to be that in the former case the insurer has a right to draw against a deposit for the cost of the insurance, while in the latter case a specified sum is paid for the insurance, and the insurer thereafter may or may not return to the stockholders or insured a part of the company's earnings. In other words, in the ordinary mutual insurance company case the cost of the insurance is paid in advance, and the insured is only entitled to a portion of the company's earnings, if any. Under the plan of the taxpayer, no set, definite sum is paid to the insurer as the cost of insurance. Taxpayer has only the right to draw on an account set up for the purpose of paying the cost of insurance, and this cost of insurance is to be computed after the protection begins.

REINSTALLATION OF BARE NEUTRAL CABLE AT STATE COLLEGE UNDER
CONTRACT WITH FPHA; CONTRACT NO. NC-V-31186

7 October 1946

In conference with Mr. Canady in this office this morning, at which time there was present Mr. J. G. Vann, Assistant Controller and Business Manager of State College, Mr. Edgar H. Potvin, Project Engineer, Mr. J. N. Smith, Engineer, and Mr. Charles Rouse, Attorney for the Carolina Power and Light Company, the above subject was fully discussed. It appears from this discussion that there is now being completed the reerection of 27 buildings, providing 176 dwellings, for veterans on the campus of State College, under the Federal Public Housing Authority, under a contract with State College designated as NC-V-31186. In 16 of the buildings, the electrical wiring used was the reinstallation of bare neutral cable removed from the Panama City Project by the Federal Public Housing Authority for reinstallation at State College.

G. S. 160-141 provides that the electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as the National Board of Fire Underwriters, and this section requires that electric current for the purpose of illuminating a building cannot be turned on without first having had an inspection made of the wiring by the building inspector and having received from the inspector a certificate approving the wiring of such building.

In a memorandum to Mr. Edgar H. Potvin, Project Engineer, from Mr. Charles L. Levy, Region IV, FPHA, under date of September 20, 1946, he was advised by the Atlanta Office of the South Eastern Underwriters Association that Section 3372 of the National Electrical Code, as amended by Supplement to the 1940 Code, is still in effect and that this section permits the installation of bare neutral cable, or its reinstallation, until this section is revised or omitted from the National Electrical Code under the conditions stated in Section 3372.

Section 3372, above referred to, provides as follows:

"With Uninsulated Conductor. Non-metallic sheathed cable, having one circuit conductor without individual insulation but assembled with an insulated conductor or conductors beneath an over-all fibrous cov-

ering, may be used in defense emergency buildings of occupancies other than listed in 1 to 7 in section 3362. Such cable shall not be used on circuits exceeding 208 volts to ground, nor for circuits beyond the final cable branch-circuit outlet, such as non-metallic surface extensions or fixture wiring, nor for extensions to existing branch circuits on which all conductors have individual insulation. The uninsulated conductor shall be used only as a grounded circuit conductor. Distribution cabinets from which branch circuits are run, if of conducting material, shall be bonded to the grounded circuit conductor. Junction boxes, outlet boxes, covers and switch and receptacle plates on branch circuits shall be of non-conductive material approved for the purpose."

The contract for the erection of these buildings, was made by and between the United States, acting by the Commissioner of the Federal Public Housing Authority, and North Carolina State College of Agriculture and Engineering, and was made by the United States or the Federal Public Housing Authority under the provisions of Title V of the Lanham Act (Public Law 849, 76th Congress, as amended, particularly by the amendment embodied in Public Law 292, 79th Congress).

It is unnecessary to refer to the full details of this contract but it is declared to be and is for the purpose of providing for defense emergency housing for veterans and their families of World War II, and for no other purpose. Part III, clause 3.01, provides that the buildings erected under the contract shall be removed within two years after the termination of the emergency declared by the President to exist on September 8, 1939, subject to certain provisos.

I am, therefore, of the opinion that the buildings erected under the contract fall within the classification of defense emergency buildings, referred to in the National Electrical Code, Section 3372, hereinbefore quoted. It would follow that if the construction in the instant case is in accordance with this provision of the National Electrical Code, you would be justified in approving it as defense emergency housing being erected on State property under a contract with the Federal Public Housing Authority.

INSURANCE COMPANY OF NORTH AMERICA; AUTOMATIC
REINSTATEMENT CLAUSE

13 November 1946

I have received your letter of November 6 and have considered very carefully the proposed endorsement of the Insurance Company of North America which, among other things, includes the following:

"The amount of insurance hereunder shall not be reduced by the payment of a loss but that portion of the premium applicable to the amount of any loss paid shall be considered as fully earned."

I note your observation that the effect of this clause would be, in the event of a total or partial loss, to continue in effect the full amount of insurance regardless of whether or not the property was to be rebuilt or repairs made to restore it to its original value.

In view of the North Carolina statutes which are referred to in your letter, particularly G. S. 58-158, which provides that no insurance company or agent shall knowingly issue any fire insurance policy upon property

within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property nor for a longer term than seven years, would prohibit the issuance of an endorsement of this kind unless the endorsement should also provide that the amount of insurance shall at no time exceed the value of the property. This condition could be made to the endorsement and save it from conflict with our statute and, doubtless, more clearly express the purpose of the company.

Obviously, the company would not contemplate insuring for full value a building which was partially destroyed by fire but might be willing to insure the building for its value remaining after the fire, or its value after being repaired or rebuilt. Public policy would not sanction any insurance company carrying more insurance of its own or in connection with other company in excess of the value of the property.

INSURANCE; TAXATION; GROSS PREMIUMS TAX; ANNUITY CONTRACTS;
DEDUCTIONS; "RETURNED CONSIDERATIONS"; CASH SURRENDER VALUES

24 February 1947

You have requested my opinion as to whether or not an insurance company which reports its gross premiums as defined by statute to the Commissioner of Insurance for taxation may deduct from said gross premiums the amounts paid to the person entitled thereto upon the death of the purchaser of an annuity, or upon a surrender of an annuity contract by the purchaser, prior to the date upon which annuity payments under the contract are to begin. You have submitted to me eight annuity contracts for examination. The statute under which deductions are claimed reads, in part, as follows:

"... Gross premiums shall . . . mean the premiums collected for annuity and life policies issued to or the premiums of which are paid by residents of this State, or for any contracts of insurance covering persons resident in, risks within, or property located in this state, or for contracts of insurance required to be carried by the Workmen's Compensation Act (or the equivalent of such premiums in the case of self insurers), . . . with no deduction for dividends, whether returned in cash or allowed in payment or reduction of premiums or for additional insurance and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies, excluding cash surrender values . . ."

The first of these contracts is a "joint and survivor annuity" which provides that upon the death of both annuitants "prior to the due date of the first annuity payment, no payment shall be made under this contract, nor shall the Society refund the consideration for this contract or any part thereof." Since it is clear that annuity payments are not deductible under our statute and nothing is to be paid to the annuitants if they die before the date on which annuity payments are to begin, no question is presented for decision under this type of contract.

The second contract is a "life annuity" which provides that upon the death of the annuitant "prior to the due date of the first annuity payment, no payment shall be made under this contract, nor shall the Society refund

the consideration for this contract or any part thereof." This contract, like the one mentioned above, presents no question for decision because nothing is paid by the company except annuity payments.

The third contract is a "refund annuity" which contains no agreement to pay anything to anyone upon the death of the annuitant prior to the date on which annuity payments are to commence. The contract does provide that if the annuitant dies after the date on which annuity payments are to begin and before the amount of the consideration paid by the annuitant has been returned by the company in annuity payments, the company will continue the payment of the annuity until the total amount of the annuity payments made by it equals the consideration paid. Since the contract contains no provision that the company shall make any payment or payments of any kind to any person upon the death of the annuitant prior to the date on which annuity payments are to start, the company is under no obligation to return any of the consideration paid. *RISHEL v. INSURANCE CO.* (CCA-10; 1935), 78 F. (2d) 881. Thus, no question of the deductibility of payments is presented in case the purchaser dies before annuity payments start.

The payments made to the annuitant after the date on which annuity payments are to start even though such payments are continued for a while after the annuitant's death are not returned premiums and are not deductible from gross premiums for taxation purposes. *ASSURANCE SOCIETY v. JOHNSON* (Cal.; 1942), 127 P. 2d 95.

The fourth contract is a "special life annuity" which provides for annual annuity payments to the annuitant so long as he shall live and for the payment of a death benefit to the beneficiary upon the death of the annuitant. This payment to the beneficiary is not, in my opinion, a return of consideration but is, as stated in the contract, the payment of a death benefit. Since it is in no sense of the phrase a returned premium, it is not deductible from gross premiums for tax purposes under our statute.

The fifth contract is a "retirement plan annuity"; the sixth is an "optional deferred annuity"; and the seventh is a "retirement plan annuity (at 65)." Each of these contracts provides that if the annuitant dies prior to the retirement date, a death benefit will be paid to the beneficiary named in the policy. The eighth contract is a "single consideration deferred refund annuity," which provides that upon the death of the annuitant prior to the due date of the first annuity payment, the company will pay the amount of the consideration in 120 equal monthly instalments. Payments made under contracts similar to the ones mentioned in this paragraph and before the retirement date or the date on which annuity payments are to start, are the payments which the company seriously contends are deductible as "returned premiums."

It should be remembered that such payments are not deductible under our statute unless they are made for adjustment of policy rates "or for cancellation or surrender of policies, *excluding cash surrender values.*" Thus, if the payments made by the companies and claimed as a deduction are "cash surrender values," they may not be deducted from gross premiums for taxation purposes.

The cash surrender value of a policy is the value or worth of a policy upon its surrender to the company. This value or worth must arise from and by the terms of the policy or contract itself and not independently of the contract or policy. If a contract or policy does not provide for the payment of anything to the policy holder upon surrender, then the policy or contract does not have any cash surrender value. Conversely if the policy provides for the payment of any amount (lump sum or instalments) to the policy holder upon its surrender, then that amount is the cash surrender value of the policy; that is, such amount is the *value of the policy* upon its surrender to the company. The cash surrender value of a policy or contract is a property right *created or established by the policy or contract itself*. See, *STATE v. LARSON* (Fla.; 1943), 12 So. 2d 896, 897. An example of a policy having a cash surrender value is a life insurance policy which provides by its terms that the company will pay to the insured a specified sum upon a surrender to it of the policy. On the date upon which the policy may be surrendered, it has a value of the stated amount. It has this value only because the policy itself provides that it shall have this value. An example of a policy which does not have a cash surrender value is a fire insurance policy which does not provide for any payment to the Insured upon a surrender of the policy. If, for example, a three year fire policy which is paid for in advance is cancelled after one year, the insured is entitled to a refund of the premium paid for the second and third year. This right, however, does not arise because of the existence of such a provision in the contract. It arises by operation of law. This is not the cash surrender value of the insurance policy; this is a right which exists independently of the contract. Cf. 29 AM. JUR., INSURANCE, Sec. 460; cf. *HUGHES v. LEWIS*, 203 N. C. 775; see, *ASSURANCE SOCIETY v. JOHNSON* (Cal.; 1942), 127 P. 2d 95, 107.

Does the policy holder have the right to surrender the policy in any one of the contracts under consideration and have returned to him the premiums or considerations paid in the absence of a provision of the contract to that effect? The authorities answer this question in the negative. *RISHEL v. INS. CO.* (CCA-10; 1935), 78 F. (2d) 881; see, *ASSURANCE SOCIETY v. JOHNSON* (Cal.; 1942), 127 P. 2d 95, 109. Therefore, I am of the opinion that payments made by the company under the contracts under consideration are not returned premiums but are cash surrender values and are not deductible from gross premiums for taxation purposes under the statute.

The company relies on the cases of *ASSURANCE SOCIETY v. JOHNSON* (Cal.; 1942), 127 P. 2d 95, and *ASSURANCE SOCIETY v. HOBBS* (Kan.; 1942), 127 F. 2d 477.

In the *JOHNSON* case, *supra*, the Court was construing a provision of the California Constitution which authorized a deduction of returned premiums from gross premiums for taxation purposes. The constitutional provision does not mention cash surrender values. The Court held that the payments made to policy holders before the date on which annuity payments were to begin under contracts similar to the ones under consideration were returned premiums and, therefore, deductible. Its holding, however, was based on the history of the provision of the California Constitu-

tion and the California statutes. It said that these payments were the payment of *cash surrender values*, but since the California Legislature had made no distinction between returned premiums and cash surrender values in the case of annuity contracts *as it had done in the case of life insurance contracts*, the Court would not read this distinction into the provision of the Constitution. On page 108 the Court said:

"So far as life insurance policies are concerned, from an early date there has been a specific provision which has regulated what shall be done on cancellation of such policies, which provision did not use the phrase 'return of premiums.' . . . *There can be no doubt that from this early date the legislature treated return premiums as one thing, and cash paid on surrender or cancellation of life policies as quite another. That this surrender value did not apply to annuities is made quite clear by the subsequent statutory history.*" (Italics ours).

Again, on page 109, the Court observed:

"For these reasons, we think it to be clear that cash or surrender values paid on the cancellation of a life insurance policy are not return premiums as used in the tax provision in question. But that does not determine that *cash or surrender values paid on the cancellation of a pure annuity contract* prior to the starting of payments to the annuitant are not return premiums." (Italics ours).

Since our statute, by its terms, applies to annuity contracts in its coverage portion, I see no reason why it should not be construed to cover annuity contracts in the portion dealing with deductions. Therefore, I feel that the JOHNSON case, *supra*, when interpreted in view of the California Constitution and statutes, is not in point.

The JOHNSON case, *supra*, does contain statements that payments made by the company to the purchaser of an annuity contract or to the person designated by him before the date on which annuity payments are to commence, are payments made before the risk attaches. No authority is cited in support of these statements, and these statements are incongruous with a *dictum* in COYNE v. INSURANCE CO. (Cal.), 47 F. (2d) 1079. I cannot accept these statements as controlling. In my opinion the risk in an annuity contract attaches at the instant the contract is complete. If this were not true, the purchaser of the contract would be able to recover the considerations paid without a provision in the contract to that effect. Cf. AM. JUR., Vol. 29, INSURANCE, Sec. 460. In the absence of a contract provision, however, no such recovery may be had. RISHEL v. INSURANCE CO. (CCA-10; 1935), 78 F. (2d) 881; see, ASSURANCE SOCIETY v. JOHNSON (Cal; 1942), 127 P. 2d 95, 109.

In COYNE v. INSURANCE CO., *supra*, the following appears:

"The fact that death occurred before any such payments became due does not change the situation and the intestate ran the risk of such an event just as the respondent ran the risk that the contract might turn out to be unprofitable to it in the event that the other party thereto outlived his normal expectancy."

At the moment that the annuity contract becomes complete the risk mentioned in the above quotation attaches, and, in addition, the company takes the risk that the purchaser will die before he pays to it enough to allow it to earn thereon an amount sufficient to defray the costs of issuing the policy and setting it up on its books. In my opinion the North Carolina courts would not follow the JOHNSON case, but would hold that the risk attaches when the contract is completed.

ASSURANCE SOC. v. HOBBS, *supra*, relied on by the Company, is of little value in answering the questions which you propound. The case as reported in the National Reporter System does not give the facts on which the decision is based, and I cannot, therefore, consider it as directly in point. An examination of the Kansas statute (G. S. 1935, 40-252) does disclose that no reference is made therein to cash surrender values, at least in so far as deductions from gross premiums for taxation purposes are concerned. The absence of such a provision may be sufficient to distinguish the case from the situation under consideration.

I therefore, advise that in my opinion payments made by a company to the purchaser of an annuity contract or to a person designated by him before the date on which annuity payments are to begin are not returned premiums but are cash surrender values and are not deductible from gross premiums for taxation purposes under our statute.

FARMERS MUTUAL FIRE INSURANCE ASSOCIATION; CONTRIBUTION TO
GREENSBORO COLISEUM MEMORIAL

19 February 1947

I received your letter of February 18, enclosing to me a letter to you from Mr. S. E. Coltrane, President of the Farmers Mutual Fire Insurance Association of Greensboro, and a copy of the resolution adopted at the annual meeting of the policyholders of this association, authorizing the Board of Directors of the association to make a contribution from the association's funds in the sum of \$1,000.00 to the erection of the Greensboro Coliseum Memorial in honor of the men and women of Guilford County who were in service in World War II.

I note from your letter that you are of the opinion that, under authority of this resolution, the Board of Directors would be authorized to make this contribution of company funds, as you find no statute which is directly applicable to the situation, pro or con.

I agree with you that the resolution of the policyholders would be sufficient authority for the Board of Directors to make this contribution, which certainly could not be questioned by anyone except the one policyholder who voted against it. The contribution might be considered in the nature of a business expense, in that it builds good will for the association, and, in my opinion, the one dissenting policyholder would not be able to maintain an action, on account of this contribution being made, against the directors. I assume from your letter that the contribution will be made without impairment of the required reserves of the association.

STATE PROPERTY FIRE INSURANCE FUND; UNIVERSITY OF NORTH CAROLINA;
BUILDINGS FURNISHED FROM ESCHEAT FUND

7 July 1947

I acknowledge receipt of your letter enclosing a copy of a letter from Mr. C. E. Teague, Business Manager of the University of North Carolina. You raise the question as to whether or not the properties, as mentioned in Mr. Teague's letter, are covered by the State Property Fire Insurance Fund.

Of course, before I could definitely say that the properties in question are covered by the State Property Fire Insurance Fund, it would be necessary for me to know exactly how the property is held and in whom the title is vested. However, it is my understanding that the titles to such properties vest in the University of North Carolina, an institution, or agency of the State, and that the proceeds derived from such properties are used for purposes sponsored by the University; and if I am correct in this assumption, I think that such properties are covered by the State Property Fire Insurance Fund.

INSURANCE AGENTS; LIABILITY FOR COUNTY OR MUNICIPAL
PRIVILEGE TAX

19 August 1947

I have your letter of August 16 relative to the above subject together with copies of letters from Mr. S. G. Otstot, Executive Secretary of the North Carolina Association of Insurance Agents, Mr. E. G. Thompson of Roxboro, and Mr. Homer J. Cochrane of Troy. Mr. Otstot asks your opinion as to whether municipalities and counties may levy a privilege or license tax upon insurance agents, and you in turn have asked my opinion upon this matter.

You call my attention to G. S. 105-228.10 which is as follows:

"No Additional Local Taxes. No county, no city or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this article."

G. S. 160-56 reads in part as follows:

"The Board of Commissioners . . . may annually lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law."

The Supreme Court, in construing this section in *LENOIR DRUG COMPANY v. LENOIR*, 160 N. C. 571 (1912), stated:

"The word 'trade' as used in acts to raise revenue is defined to be 'any employment or business embarked in for gain or profit.' *STATE v. WORTH*, 116 N. C. 1010."

It would seem to me that doing business as an insurance agent, or the operation of an insurance agency, comes within the meaning of the section as defined by the Court. With respect to municipal taxation, whether

license taxes may be levied upon insurance agents, depends upon whether some provision of law prohibits such levy.

G. S. 105-228.4 requires the payment of annual registration fees by insurance companies, and G. S. 105-228.5 levies a gross premiums tax upon companies. G. S. 105-228.5 provides for registration fees for agents, brokers, and others. It will be noted that that section imposes a fee upon "each and every special or district agent, manager, or organizer, general agent, local canvassing agent, resident or non-resident adjuster, or non-resident broker representing any company referred to in this Article."

It will be noted that these annual registration fees are imposed upon the agents, brokers, etc., and not upon the companies which they represent. G. S. 105-228.10, referred to in your letter, provides that counties, cities, and towns shall not be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, *upon any insurance company or association paying the fees and taxes levied in this article*. It should be noted that this section does not prohibit the levying by municipalities and counties of additional license fees upon *agents and brokers* but confines the prohibition to additional taxes upon *insurance companies or associations*. As I understand it, several municipalities are attempting to levy license or privilege taxes upon *agents* and not upon insurance companies which the agents represent. In my opinion, the statute referred to in your letter does not prohibit the levy of reasonable license or privilege taxes upon such individuals who carry on and enjoy a trade or business within the corporate limits of the municipality.

With respect to the levy of such license or privilege taxes by counties, the situation is different from that of municipalities, as counties have no general taxing power such as given to the municipalities by G. S. 160-56. Since counties do not have this general taxing power, it is necessary for them to proceed to levy such taxes under some specific grant of power. I know of no statute authorizing counties to levy a privilege or license tax upon insurance agents.

STATE SELF FIRE INSURANCE; FIRE INSURANCE STATE PROPERTY;
WHAT INCLUDED — LONG LEASES

9 September 1947

You will recall that you furnished this office with an inventory of frame houses or buildings, cabins, oil houses, tool rooms, garages, and buildings of such nature owned by the Department of Conservation and Development and used by the Division of Forestry and Parks for the purpose of forest fire control. These buildings are located upon lands leased by the State of North Carolina, or by the Department of Conservation and Development as the case may be; and these leases extend for various terms of years. Some of these leases extend for ninety-nine years. Some of the leases provide that upon notice by either the State or the property owner, the lease can be terminated. I understand that there are various types and kinds of leases but that all of these leases contain a provision recognizing the State to be the owner of the buildings located on the leased premises, and the State has a right to remove these buildings from the premises.

You would like to know if these buildings should be considered by the State as insurable property and if their value should be taken into consideration in connection with the State Property Fire Insurance Fund as provided by Article 21, Chapter 58, of the General Statutes.

I have examined Article 21 of Chapter 58 of the General Statutes in detail; and it is my opinion that in setting up the reserves and filing the estimates required by the statute, it was contemplated that property such as described in the inventory before me should be included in such estimates. I think the statute is careful to include all State-owned buildings with the reference whether or not the buildings are located on real estate owned by the State. The statutes involved, it seems to me, expressly show that there is no distinction to be made as to buildings owned by the State and located on State-owned real estate or other buildings owned by the State and located on lands owned by someone else. In the situation that we have before us, the buildings are treated as property which are severable and can be removed from the real estate. The title to the buildings is in the State of North Carolina.

In my opinion, therefore, when you file your estimate of appropriations which will be necessary for the purpose of setting up and maintaining an adequate reserve to protect the State from loss or damage to its property, you should consider the buildings contained in the inventory in your estimates.

REPAIR, REPLACEMENT COST, OR DEPRECIATION INSURANCE

12 September 1947

I acknowledge receipt of your letter in which you enclosed copies of two endorsements to fire insurance policies by which certain companies would insure repair, replacement cost, or depreciation.

You inquire whether or not such insurance would violate provisions under Sections 58-158 and 58-159 of the General Statutes.

I have given some study to these proposed endorsements and if I correctly understand the meaning of insuring for repair or replacement or depreciation I am satisfied that such endorsements are in direct contravention of Section 58-158. As you know, this section prohibits the issuance of any fire insurance policy upon property within the State for an amount which together with any insurance thereon exceeds the fair value of the property. Companies violating the provision of this section are subject to the penalties fixed by Section 58-173. Because of the severity of these penalties I would not advise you to approve these endorsements until the courts have passed upon the question or legislative authority has been obtained for the writing of such coverage.

INSURANCE; CONTRACTS FOR AMBULANCE SERVICE NOT SUBJECT TO INSURANCE LAWS

12 September 1947

I acknowledge receipt of your letter in which you enclose a proposed contract between an ambulance service company and third parties.

I am of the opinion that this contract does not constitute an insurance contract, but is a contract between the ambulance service company and third parties in which ambulance service is to be furnished to such parties upon the payment of a fixed fee.

Section 58-3 defines an insurance contract as follows:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity for, the destruction, loss, or injury of something in which the other party has an interest."

Section 58-72 states the purposes for which insurance companies may be formed. I find nothing in this section which includes the type of contract about which you inquire. It must be admitted that the contract does have some of the earmarks of insurance, but I would not want to say that such contracts constitute insurance unless they more closely resembled the types of insurance contracts authorized by the statute. It may be that such contracts should be classed as insurance, but it seems to me that more definite legislative authority should be obtained before holding them to be contracts of insurance.

SENATE BILL NO. 228; FIRE PROTECTION IN HOTELS AND OTHER
BUILDINGS OF LIKE OCCUPANCY

5 September 1947

I have your letter of July 25 in which you ask a number of questions relative to the construction of Senate Bill No. 228 dealing with fire protection in hotels and other buildings of like occupancy. Your questions and the answers thereto are as follows:

(1) Section 69-27 provides that "there shall be provided a manually operated fire alarm, bell or gong system, approved by the Commissioner of Insurance, suitable to arouse all occupants of such buildings if necessary in case of fire or other emergency, and capable of being operated by one operation at the main desk or at the telephone switch board." Under the provisions of such section, may this Department accept or approve a system incorporating sirens and like appliances, or does the section limit the approval to a "bell or gong system?"

In my opinion, the language "a manually operated fire alarm, bell or gong system, approved by the Commissioner of Insurance," is broad enough to include a system incorporating sirens and like appliances if such sirens and like appliances are approved by you. It seems to me that the purport of the section is to require the installation of any alarm device which would be sufficient to warn the occupants of the building wherein installed at the outbreak of a fire therein.

(2) The application of section 69-29 is contingent upon the height of the buildings in question. In certain sections reference is made to buildings of "more than three stories in height" and in others the reference is to buildings of "three stories or less in height" while in a still further section the reference is to buildings "more than four stories in height."

There is no definition as to what constitutes a story in the provisions of this bill. Will you, therefore, please advise whether the definition of what constitutes a story as contained in the North Carolina Building Code shall apply when considering the word and phrases "height" and "stories" as used in this bill.

In my opinion, the definition of a "story" as contained in the North Carolina Building Code may be applied when considering the words and phrases "height" and "stories" as used in the Act. Section 69-26, dealing with administration provides:

"For the purpose of administering and enforcing the provisions of this article, reference is made to Article 9 of Chapter 143 of the General Statutes of North Carolina, known as the North Carolina Building Code and all rights, powers, duties and authorities provided in said Code shall apply and be in force in the administration and enforcement of this Article except as may be specifically provided hereunder; and such rules, regulations, standards, classifications or restrictions necessary in the administration and enforcement hereof and appeals therefrom and thereupon shall be made in accordance with said Article 9, Chapter 143 of the General Statutes of North Carolina."

The Article referred to created the Building Code Council and authorized the promulgation of the North Carolina Building Code containing certain standards, specifications, restrictions, etc. It seems to me that Senate Bill No. 228 contemplated administration of that Act by reference to the North Carolina Building Code, and the regulations, standards, definitions, etc., contained in the North Carolina Building Code, in the absence of express provisions to the contrary, should be applied in administration of Senate Bill No. 228.

(3) Section 69-35 provides for condemnation of buildings by the Insurance Commissioner and requires the affixing of a notice of the dangerous character of the structure in a conspicuous place on the exterior wall of such building. Section 69-29 allows a period of three years from the effective date of the article for compliance with the provisions of the section. In the event a hotel of frame or class "C" or "B" construction over three stories in height and without a sprinkler system is found to be dangerous to the safety of human life and is condemned by the Commissioner, is the notice required to be affixed and attached to the building immediately, or is the waiting period of three years applicable to the affixing of the notice?

In the event a hotel of frame or class "C" or "D" construction over three stories in height and without a sprinkle system and found to be dangerous to the safety of human life, and condemned by the Insurance Commissioner, I am of the opinion that the notice required to be affixed and attached to the building by Section 69-29 should be affixed immediately and that the period of three years from the effective date of the Act, for compliance with the provision of Section 69-29, does not apply. In my opinion, compliance with Section 69-29 may be postponed for three years from the effective date of the Act regardless of whether an especial hazard or dangerous condition exists, but that irrespective of a compliance with Section 69-29, it is the duty of the Commissioner of Insurance to condemn any hotel or other building of like occupancy found to be especially dangerous to life because of its liability to fire, etc., as set out in Section 69-35. I do not believe it to be the intent of the Act to permit a hotel or other build-

ing of like occupancy, which is found to be especially dangerous to life because of its liability to fire or by reason of bad condition, to be continued to be occupied during the three year waiting period.

(4) Section 69-36 provides a penalty for allowing unsafe buildings to remain occupied, and after it has been condemned by the Commissioner of Insurance or his authorized deputy after having notified the proper parties in writing of the unsafe and dangerous character of said building, and if such use and occupancy shall continue for a period of as much as thirty days without remedying condition complained of. Is the notice of condemnation required to be affixed under section 69-35 required to be affixed immediately upon the act of condemning the building or should the notice be affixed to the building at the expiration of the thirty day period provided in section 69-36?

I am of the opinion that the Commissioner of Insurance is required to affix the notice of the unsafe condition of the building immediately upon the inspection and finding that the building is unsafe, as defined in Section 69-35, and that the thirty-day period allowed for placing the building in safe condition does not apply to the affixing of the notice. Construing the two sections together, it seems to me that the Legislature intended that the notice should be affixed immediately upon a finding that the building is in an unsafe condition in order to warn persons of the risk involved in occupying the building. The thirty-day provision is to give the owner of the building or lessee a reasonable time in which to remedy the condition. If the condition is not remedied within the time allowed, or any extension thereof, Section 69-36 makes it illegal to permit continued occupancy. There would not seem to be much point in affixing the notice after occupancy had become illegal.

(5) Under the provisions of sections 69-28 and 69-29 there appears to be a joint responsibility upon the Commissioner of Insurance and/or his deputies, and the Chief of the Fire Department. In case the Chief of the Fire Department in a city or town fails for any reason to proceed under the provisions of this law, how far can the Commissioner of Insurance proceed in such cities and towns and what is his responsibility under these sections in such cases?

In my opinion, Sections 69-28 and 69-29, in some instances, place concurrent duties and responsibilities upon the Commissioner of Insurance and the chiefs of police of incorporated municipalities, and in other instances place these duties and responsibilities entirely upon the Commissioner of Insurance. With respect to the approval of watchman service within the corporate limits of the municipalities under Section 69-28, it seems to me that, unless the Chief of the Fire Department approves such watchman service, it becomes the duty of the Commissioner of Insurance to pass upon it. I doubt whether the Legislature intended to give the Commissioner of Insurance power to override the Chief of the Fire Department in instances where the Chief may have approved watchman service which may not seem entirely adequate to the Commissioner of Insurance. The use of "and/or" might suggest that the Chief and the Commissioner must each approve the watchman service or that the Commissioner alone may do so. This, however, is not the usual interpretation of the phrase "and/or." In my opinion, the Commissioner of Insurance should give his approval or disapproval to the watchman service in those cases in which the Chief of Police fails

to act. This construction is strengthened by Section 69-38 which provides that nothing in the article shall be construed to limit powers granted to and duties imposed upon chiefs of fire departments and building inspectors by Article 11, Chapter 160 of the General Statutes. If, however, the owner or lessee of the building desires to provide an automatic fire detection system in lieu of watchman service, such fire detection system must be approved by the Commissioner of Insurance and the North Carolina Building Code Council. The Chief of the Fire Department does not share this responsibility. Similarly, under Section 69-29(c) it is the sole responsibility of the Commissioner of Insurance or his deputies to permit the installation of an approved automatic detection system in lieu of an automatic sprinkler system; and under Subsection (b) of the same section, it is the sole responsibility of the Commissioner of Insurance to require and approve automatic sprinkler systems in his discretion in areas defined in that subsection. It is the concurrent responsibility, however, of the Insurance Commissioner and of the Chief of the Fire Department to approve the manner in which the areas of especial fire hazard described in Subsection (b) shall be cut off. As in Section 69-28, I am of the opinion that it is the duty of the Commissioner of Insurance to grant or withhold his approval in those cases where the Chief of the Fire Department fails to act; but if the Chief of the Fire Department approves the manner in which these areas are cut off, I am of the opinion that the Commissioner of Insurance does not have authority to overrule the Chief's approval.

"HOME SECURITY PLAN CERTIFICATE" IS NOT INSURANCE

15 November 1947

I acknowledge receipt of your letter of November 6 enclosing a copy of a certificate which certain merchants propose to issue to their customers and a letter from the Deputy Insurance Commissioner of the State of Michigan.

The Deputy Commissioner of Insurance for the State of Michigan says that his department does not consider such certificate as insurance within the provisions of the insurance laws of the State of Michigan.

I am of the opinion that this certificate is a mere contract between the merchant and his customer and does not fall within the definition of insurance as defined in Section 58-3 of the General Statutes.

HOSPITAL CARE ASSOCIATION; REINSURANCE OF MEDICAL SERVICE ASSOCIATION BY HOSPITAL CARE ASSOCIATION, INC.

14 November 1947

I acknowledge receipt of your letter of November 1 enclosing copies of resolution adopted by the Hospital Care Association and the Medical Care Association on August 26, together with copies of resolutions adopted by said associations on September 26, amending the prior resolution, and a copy of an agreement between the United States of America and the Medical Service Association and certain correspondence between the associations and your office.

You inquire "as to whether or not the Hospital Care Association, Inc., Durham, N. C., has the legal authority to reinsure the liability of the Medi-

cal Service Association, Inc., of Durham, N. C." and as to whether or not your "department can pass on the propriety of the terms of the reinsurance contract as it might affect the present certificate holders of the Hospital Care Association, Inc." I have not had access to the certificates of incorporation of the two associations nor to the by-laws so that I do not feel that I should express an opinion as to the authority of the Hospital Care Association to reinsure the liability of the Medical Service Association, Inc. I might say that I do not find any statutes which would prohibit one association from reinsuring the liability of another medical care association.

As to your second question I think that your department may pass on the propriety of the terms of the reinsurance contract as to its effect on the present certificate holders of the Hospital Care Association.

STANDARD FIRE INSURANCE POLICY—BINDERS; RIGHT TO RENEW

24 November 1947

I received your letter of November 21, quoting the provisions of G. S. 58-177(d) and requesting my opinion as to whether or not a binder executed for a particular property could be renewed or a new binder executed at the expiration of the initial 30-day period.

The subsection does not clearly provide an answer to this question. It only says that binders or other contracts for temporary insurance may be made for a period which shall not exceed thirty days, but I am inclined to the opinion, from reading this section, that it was the intention of the General Assembly to confine the period for which binders could be issued to a total of thirty days. The object of such a provision as this is to afford the insurer the opportunity to prepare and deliver the proper policy as provided by the statute. To permit the extension of the binder for thirty days or to permit renewals might conceivably have the effect of indefinite postponement of the actual issuance of the policy and defeating the purpose of the statute. If one renewal or extension should be allowed, there would be no basis for determining for what length of time such insurance might not, in this way, be extended by binders indefinitely.

BUILDING AND LOAN ASSOCIATIONS; AGREEMENT CONCERNING JOINT STOCK SIGNATURE

25 November 1947

I acknowledge receipt of your letter in which you enclose a card containing the agreement which is used in connection with the issuance of the Building and Loan stock to joint owners. The pertinent portion of the agreement reads as follows:

"... and Loan Association issued to or standing in the names of the two persons whose names are signed below, either now or hereafter, are and shall be for the use and benefit of each and both of us, and the said Association is hereby authorized and empowered to pay from time to time any part or all of the withdrawal value of said shares to either of the undersigned upon receipts signed by only one of us, or upon endorsement of any certificate for any part or all of said shares by either of us.

"It is further stipulated and agreed between the undersigned that upon the death of either of us the survivor shall be entitled to and be the sole owner of Shares in said Association then standing in the names of both of us, and the said Association is authorized and empowered upon the death of either of us to transfer said shares absolutely to the survivor, or pay to the survivor the withdrawal value of any or all such shares.

"IN WITNESS WHEREOF, We have hereunto set our hands and seals, the day and year above written.

Witnesses:

..... (SEAL)
..... (SEAL)"

You state that the Roxboro Building and Loan Association has inquired "in the event stock is issued to a husband and wife jointly, is it necessary to have the special acknowledgment to this agreement in order to make the same binding upon the wife?"

I think it highly desirable that the husband and wife be required to sign the agreement since in the absence of such agreement it would be possible to go beyond the issuance of the stock and establish whose money was used to purchase the same which might cause some trouble, but if the proposed agreement is signed there could be no question as to the ownership of the stock or the person entitled to the proceeds thereof insofar as the Building and Loan Association is concerned.

INSURANCE; CERTIFICATES OF INCORPORATION; SUBSCRIBERS TO STOCK;
CORPORATION AS INCORPORATOR

1 December 1947

I acknowledge receipt of your letter enclosing a copy of a letter from Messrs. Womble, Carlyle, Martin and Sandridge, Attorneys in Winston-Salem.

Several questions are raised as to the necessary procedure to incorporate a domestic insurance corporation.

The first question raised is whether subscribers to certificates of incorporation must state the amount of stock subscribed. The general insurance statutes made no reference to this question, but Section 58-69 reads in part as follows:

"The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters."

Section 55-2(5) of the General Statutes applicable to general corporations requires "the names and post office addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and post office addresses of the incorporators." I am therefore of the opinion that the subscribers to a certificate of incorporation of an insurance company are required to indicate the number of shares of stock subscribed for by each.

I agree with you that since Section 58-78 provides that the capital stock shall be paid in cash within twelve months from the date of the charter or certificate of incorporation and that no certificate of full shares and no policy may be issued until the whole capital is paid in and payment of the entire capital stock is not required at the time of the filing of the certificate of incorporation.

You also inquire as to whether or not a New Mexico corporation may be an incorporator of a North Carolina Insurance Corporation.

G. S. 55-2 read in part:

"Three or more *persons* who desire to engage in any business, or to form any company . . . may be incorporated in the following manner . . . Such *persons* shall, by a certificate of incorporation, under their *hands and seals*, set forth—"

Section 12-3 on statutory construction, Paragraph 6, reads in part as follows:

"The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary."

Nothing else appearing, the word 'person' contained in Section 55-2 would include, when construed in the light of Section 12-3, a corporation. There are some sections in Chapter 55 which infer that the term 'person' does not include corporation. For instance, G. S. 55-2 uses these words: "under their *hands and seals*." Section 55-7 provides that "when one or more of the incorporators of any corporation *die* before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the *deceased*."

While I have been unable to find a North Carolina case which answers this question, most of the textbooks and courts of other jurisdictions hold that the word 'person' when used as denominating an incorporator means an individual and not a corporation. The State of Washington has a statute which provides in part that the term 'person' may be construed to include the United States or any state or territory, or any public or private corporation as well as an individual. The Supreme Court of that state in passing on a question almost identical with your inquiry said:

"As to the second proposition, a corporation can only be formed in the manner provided by law, and has only such powers as the law specifically confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression, "two or more persons," in section 1498, 1 Hill's Code. It is true that section 1709, 2 Hill's Code, provides that the term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term "person" is always to be construed as a private corporation, any more than it is always to be construed as the United States. Mor. Priv. Corp. S 433 says: 'A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly by persons acting as its agents or tools;'

citing *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475. The author, continuing, says: 'The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations.' This, it seems to us, for manifest and manifold reasons, is in accordance with public policy; and we therefore decide that, under the existing laws of this state, one corporation cannot subscribe to the capital stock of another corporation."

DENNY HOTEL CO. v. SCHRAM, 32 P. R. 1003.

13 *Am. Jurisprudence*, Section 23, reads in part as follows:

"Many statutes require that the incorporators be natural persons of full age." "Such a provision, of course, precludes an existing corporation from becoming an incorporator of another corporation. Moreover, the view is taken that a statute providing for the formation of corporations by two or more 'persons' refers to *Natural persons* and that a corporation cannot, therefore, become an incorporator under such a statute."

Chapter 4, Section 85, Volume I of *FLETCHER'S* on corporations reads in part:

"but in the absence of charter power and statutory authority one corporation cannot itself form another."

"Statutes providing for the formation of corporations are not to be construed as authorizing other corporations to become corporators, unless such an intention on the part of the legislature is clear, especially statutes authorizing 'persons' to form corporations, wherein cannot be implied or discerned any intentment that other than natural persons are meant."

In the absence of an opinion of our State Supreme Court I am unable to express a definite opinion as to whether or not one corporation may become an incorporator of another corporation in this State. Even if it should be conceded that one corporation could become an incorporator of another, I am of the opinion that under the requirements of Section 58-73 there would have to be at least ten incorporators who are "natural persons."

FRED W. GREENE, EXECUTIVE SECRETARY, NORTH CAROLINA BANKERS
ASSOCIATION, ELIGIBILITY FOR INSURANCE AGENT'S LICENSE

20 January 1948

I received your letter of January 16 with reference to the eligibility of Mr. Fred W. Greene, Execution Secretary of the North Carolina Bankers' Association, for a license as an insurance agent, in which you quote the provisions of G. S. 58-41.

I note that you reach the conclusion that Mr. Greene is not eligible for a license as an insurance agent under the provisions of the statute quoted. You state that Mr. Greene informed you that he was interested in a license as an insurance agent for the purpose of installing an insurance program for employees of banks in membership (North Carolina Bankers Association). You also state that Mr. Greene admitted that he was interested in becoming an agent for a fidelity and surety bonding company for the purpose of writing bonds for banks in North Carolina.

The statute, G. S. 58-41, provides that no license may be issued to an agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him for the general public *during the preceding year*, shall not exceed those on insurance signed, countersigned, issued or sold by him covering his own property or life and the property and lives of members of his immediate family, *his employer and his employees*.

As Mr. Greene has not heretofore been licensed, there would be no experience for the "preceding year" upon which to test the application of the statute. In addition to this, I do not think that his writing of insurance for banks of North Carolina would be writing for his "employer." Mr. Greene is employed by the North Carolina Bankers Association, a voluntary non-stock association incorporated under the laws of this State, which is an entirely separate and distinct entity from the banks of North Carolina which are members of the association. In my opinion, the statute would not be applicable in such an instance as this, even though the insurance writings had been in the previous year confined to North Carolina banks.

I am, therefore, of the opinion that Mr. Greene is entitled to take the examination and would be eligible for a license if he can succeed in passing it.

FIRE PROTECTION; AUTHORITY OF VOLUNTEER FIRE DEPARTMENTS TO DIRECT
TRAFFIC IN THE VICINITY OF A FIRE; DUTIES OF MEMBERS
FIRE DEPARTMENTS

22 March 1948

I have been unable to find any law specifically setting forth the rights, duties and authority of a fire department to direct traffic in the vicinity of a fire and to order sight-seers out of a burning building.

Under G. S. 160-117, the duties of the chief of a municipal fire department are to preserve and care for the fire apparatus and have charge of the fighting and putting out of all fires.

G. S. 130-39 sets forth the corporate powers of a sanitary district. Subsections 13 and 14 of this section authorize a sanitary district to establish a fire department for the protection of property within the district and to contract with cities, counties or other governmental units to furnish fire fighting apparatus and personnel for use in the district. A sanitary district under Subsection 14, is clothed with all privileges and immunities that are now granted by law to other governmental units in furnishing fire protection.

It is the opinion of this office, therefore, that a volunteer fire department established in a sanitary district is clothed with all the powers of municipalities in this State with respect to fire protection; and in view of the fact that the chief of the fire department of a municipality, under G. S. 160-117, is charged with the duty of fighting fires, it is thought that in the exercise of this duty he would have the implied authority to direct traffic in the vicinity of a fire and to order sight-seers out of a burning building.

INSURANCE LAWS; STATE-OWNED PROPERTY

25 March 1948

In your letter of the 23rd of March, 1948, you request an opinion from this office as to a legal definition of the terms "fixtures, furniture, and equipment" as used in that portion of G. S. 58-189 which reads as follows:

"Upon the expiration of all existing policies of fire insurance upon state owned buildings, fixtures, furniture, and equipment therein, including all such property the title to which may be in any state department, institution, or agency, the State of North Carolina shall not re-insure any of such properties."

This opinion is requested in order that it may be determined just what property is covered under the State insurance fund set up by law for the protection of property destroyed by fire.

Furniture and fixtures, within the meaning of fire insurance policies, includes light fixtures and globes, ceiling fans, electric meters, mirror doors, wiring of buildings, shelving, partitions, furniture, iron safes, stationery, window blinds, furnishings, cupboards, shelves, locks, pier and chimney glasses affixed to walls, grates, etc. Words and Phrases, Volume 17, pages 118 and 119. In order to determine what is a fixture, the general tests to be applied are: (1) Annexation to the realty, actual or constructive; (2) adaption or application to the use or purpose to which that part of the realty to which it is connected is appropriated, and (3) intention to make the article a permanent accession to the freehold.

Equipment owned by charitable institutions means visible, tangible furniture, fixtures, and apparatus on the premises which are usual and necessary for the operations therein conducted. Volume 14, Words and Phrases, page 775.

In the light of the above definitions, it is the opinion of this office that only such personal property situated in State-owned buildings which is used in connection with the operations therein carried on would be covered by the State insurance fund set up by law.

FIREMEN'S RELIEF FUND; BENEFITS; SICKNESS OR INJURY NOT ARISING
OUT OF SCOPE OF DUTIES AS FIREMEN

1 June 1948

Reference is made to your letter of May 31, 1948, and also to the letter of Mr. William P. Farthing, Chairman of the Durham Firemen's Relief Fund.

Mr. Farthing's inquiry relates to the amount of benefits, if any, that the Board of Trustees of the Relief Fund is authorized to pay a fireman of the Durham Fire Department. This man has been with the Department for more than twenty years. He has developed an extreme nervous condition which, at the present time, has rendered him unable to work. He is taking treatment at Duke Hospital, and it may be several months before he returns to normal health. At present, he is without income, he is incurring medical bills and is in need of funds for current expenses to provide necessities for his wife and two children. Inquiry is made by Mr.

Farthing if the Durham Board would have authority, under one of the four subsections of Section 118-7, to make disbursement of funds in this particular case.

Subsections 1 and 2 of Section 118-7 protect a fireman in active service from financial loss where the sickness or injury is brought about by the performance of his duties as a fireman and also provide a reasonable support for dependents where a fireman loses his life by accident or disease in line of duty as a fireman. Apparently, the case mentioned in the letter of Mr. Farthing does not fall within these two paragraphs because at the present time, I have nothing before me to show that this man's sickness is due to his service as a fireman. That is a question of fact that will have to be determined by the Board of Trustees. If the Board of Trustees is convinced that this nervous disease is due to this man's service as a fireman, they can, of course, apply subsection 1 of Section 118-7.

It seems to me, however, that subsections 3 and 4 of Section 118-7 would allow the Board of Trustees of the Durham Department to spend whatever is considered by the Board necessary, in its discretion, to keep this fireman from becoming a subject of charity and also to keep any dependents of his from becoming a subject of charity. It seems to me that these last two subsections especially apply to illness or accidents incurred outside of line of duty as a fireman and, therefore, should be applied in this case.

OPINIONS TO ADJUTANT GENERAL

NATIONAL GUARD; COURTS-MARTIAL; PUNISHMENT; IMPRISONMENT

20 June 1947

You have requested the opinion of this office with respect to the authority of courts-martial of the National Guard, not in the service of the United States, to impose sentences of confinement.

The powers, duties and authority of courts-martial for the National Guard, not in the service of the United States, are to be found in Sections 127-38 through 127-48 of the General Statutes. G. S. 127-38 states that such courts-martial "shall be constituted, have cognizance of the same subject, and possess like powers, *except as to punishments*, as similar courts" in the army of the United States. (*Italics by the undersigned*). The powers of a National Guard court-martial to impose punishment, therefore, must be specifically found in the state statutes.

G. S. 127-39, relating to general courts-martial, specifically sets out punishments which such general courts-martial may impose:

- (1) To impose fines not exceeding two hundred dollars (\$200);
- (2) To sentence to forfeiture of pay and allowances;
- (3) To administer reprimands;
- (4) To dismiss from the service or to give dishonorable discharges.
- (5) To reduce noncommissioned officers to the ranks.
- (6) To impose any combination of the above listed punishments.

It will be noted that the above summarized section grants no authority to impose a sentence of confinement or imprisonment.

G. S. 127-40, relating to special courts-martial limits the punishments which such special courts-martial may impose to those prescribed for general courts-martial, with the exception that any fine imposed by such courts may not exceed one hundred dollars (\$100).

G. S. 127-41 relating to summary courts-martial, provides that a summary court may impose a fine not exceeding twenty-five dollars (\$25); may sentence noncommissioned officers to reduction to the ranks; may impose sentences of forfeiture of pay and allowances.

Thus the three sections of the law specifically set out in G. S. 127-39, 127-40, and 127-41 the punishments which the several courts-martial may impose, respectively. All three sections are very specific in listing the types and extent of punishment which such courts are authorized to impose.

G. S. 127-42 provides as follows:

"All courts-martial of the national guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed, and shall have power to direct that upon the nonpayment of a fine the person convicted shall be confined in any county jail; but such sentences of confinement shall not exceed one day for each dollar of fine authorized."

It is true that it could be argued on the basis of the language in the first part of the section above quoted that a courts-martial would have authority, at will, to impose a sentence of confinement in lieu of a fine. However, it is believed that, taken as a whole, the section is directed primarily at providing for a method of punishment when the person upon whom a fine is imposed is unable to pay the fine and that in such case, and only in such case, the court may impose a sentence of confinement in lieu of the fine. Thus, if a person should be sentenced to pay a fine of fifteen dollars (\$15), and such person were unable to pay the fine or refused to pay the fine, he could be sentenced to confinement for not exceeding fifteen days. All the portion of the section following the semicolon prescribed the measure of the period of confinement by stating that a sentence of confinement shall not exceed one day for each dollar of fine authorized. It is therefore believed that the entire purpose of G. S. 127-42 is to provide for a punishment of confinement only in the event of nonpayment of a fine.

This construction of the statutes is supported by general principles of statutory construction. Deprivation of liberty is in the civil law regarded as a severe type of punishment. Inasmuch as the authority to punish is, in the cases now being discussed, derived solely from the state civil law, and inasmuch as three different sections specify in considerable detail the types of punishment which courts-martial of the National Guard not in the service of the United States are authorized to impose, it is not believed that there is statutory authority for such courts-martial to impose sentences of confinement other than in lieu of imposition of fines upon nonpayment thereof.

In view of the above, I am unable to state that there is statutory authority for the imposition of sentences of confinement by courts-martial except in the event of nonpayment of fines.

OPINIONS TO COMMISSIONER OF LABOR

1947 BONUS APPROPRIATION ACT; STATE EMPLOYEES

20 March 1947

In your letter of the 18th of March, 1947, you state that one of your employees was on your payroll on the 1st of November, 1947, and remained on the payroll until the 8th of January, 1947, at which time she was transferred to the State Legislative payroll, and is now receiving her State check weekly. You inquire as to whether or not this employee is entitled to receive her proportionate share of the Emergency Bonus to State Employees.

I do not think so. Section 2 of the Emergency Bonus Act reads as follows:

"The Emergency Bonus herein provided for shall be payable to all teachers and State employees of the State on November 1, 1946, and who have continued in such employment until February 25, 1947."

In view of the fact that the person to whom you refer was dropped from your payroll on January 8, 1947, and in view of the language of the above statute, it is not thought that she is entitled to the additional compensation provided by the bonus bill. The fact that she accepted a position with the General Assembly would not in my opinion alter the situation since the Emergency Bonus Act does not apply to employees of the General Assembly.

DEPARTMENT OF LABOR; STATE MAXIMUM HOUR LAW; EXEMPTIONS;
EXEMPTION OF CARRIERS SUBJECT TO THE JURISDICTION OF THE NORTH
CAROLINA UTILITIES COMMISSION; MOTOR CARRIERS' ACT OF 1947;
EXEMPTIONS IN MOTOR CARRIERS' ACT

5 January 1948

I reply to your letter of December 30, 1947, in which you refer to a letter from Mr. J. T. Outlaw, Secretary of the North Carolina Motor Carriers' Association.

Your letter raises the problem or question as to whether or not certain trucking industries or enterprises are subject to the jurisdiction of the North Carolina Utilities Commission and thus exempt from the Maximum Hour Law or whether these same industries are exempt from the provisions of the North Carolina Utilities Law or Motor Carriers' Act of this State and not subject to the jurisdiction of the North Carolina Utilities Commission and thereby subject to the Maximum Hour Law. You state the proposition as follows:

"The State Maximum Hour Law exempts from its provisions those employees who are working for a public utility which is regulated by the Interstate Commerce Commission or by the State Utilities Commission. In view of the North Carolina Truck Law which was enacted by the last General Assembly, I am not at all certain as to who is sub-

ject to the State Utilities Commission, and thus exempt from our Law; or who may be exempt from the Trucking Act, and thus covered by our Law."

The exemption from the Maximum Working Hours Act, which is cited as the Maximum Hour Law, is contained in Section 95-17 of the General Statutes and is as follows:

"Provided further, that nothing in this section or in any other provision of this article shall apply to railroads, common carriers and public utilities subject to the jurisdiction of the interstate commerce commission or the North Carolina utilities commission, and utilities operated by municipalities or any transportation agencies now regulated by the federal government."

Chapter 1008 of the Session Laws of 1947 undertakes to define, classify and regulate all motor carriers of property operating over the highways of the State for compensation and is a restatement of Article 6 of Chapter 62 of the General Statutes insofar as that article undertook to regulate motor carriers of property. This chapter of the Acts of 1947 undertakes to define various terms with reference to motor carriers of property, and Section 4 of Chapter 1008, above referred to, sets forth various types of carriers that are exempt from the jurisdiction of the North Carolina Utilities Commission or in other words, they are exempt from the application of Chapter 1008 of the Session Laws of 1947. For example, property carriers under the control of the United States Government or the State of North Carolina are exempt. Transportation of certain sand and gravel, debris, etc., is exempt. Transportation of newspapers is exempt. Transportation of livestock or fish is exempt. Transportation of the raw products of the forest, including firewood, logs and crossties, etc., is exempt. There is a long list of exemptions in this section which you will find beginning on page 1437 of the Session Laws of 1947.

Subsection (2) of Section 4 of this same Act allows the Commission, at any time, to require any person or carrier purporting to operate under the exemption to furnish satisfactory proof that such person or carrier is in fact so operating so as to come within the exemptive feature. This same subsection further allows the Commission to conduct investigations and make such orders as it deems necessary to force compliance with the section.

It is plain, therefore, that Section 4 of Chapter 1008 of the Session Laws of 1947 clearly exempts the transportation of the types of property listed in that section from the jurisdiction of the Utilities Commission. The exemption is not contingent or conditional but is fixed by the statute and is automatic. The power is reserved to the Utilities Commission to make an investigation to ascertain if a certain property carrier is actually operating within the terms of the exemption; but immediately upon ascertaining that the carrier is operating within the terms of the exemption, the authority of the Utilities Commission is automatically ended by force of the exemption. The fact that the Utilities Commission may have required these industries or these property carriers to furnish certain proof that they operate within the exemption does not mean that these industries are amenable to the jurisdiction of the Utilities Commission, but it means that the Utilities Commission simply has the right to keep itself informed as

to whether or not the property carrier is still operating in the exemption field. The Utilities Commission does not fix the exemption nor create the exemption because the exemption is created by statute.

I am of the opinion, therefore, that so far as the exemption in the Maximum Hour Law is concerned, which relates to those carriers subject to the North Carolina Utilities Commission, the property carriers enumerated in Section 4 of Chapter 1008 of the Session Laws of 1947, which said property carriers are exempt from the jurisdiction of the Utilities Commission, would be subject to the jurisdiction of the Utilities Commission. I see nothing that would take them out of the Maximum Hour Law in this respect unless, of course, they are under some of the other exemptions in the Maximum Hour Law. Unless subject to some other exemption in the Maximum Hour Law, I would say, therefore, that property carriers of the type defined in the exemption stated in Section 4 of Chapter 1008 of the Session Laws of 1947 are subject to the Maximum Hour Law.

DEPARTMENT OF LABOR; BOILER INSPECTION ACT; RULES AND REGULATIONS;
NON-CODE BOILERS; NEW INSTALLATIONS; BOILERS MANUFACTURED
IN NORTH CAROLINA

22 May 1948

Reference is made to your inquiry with reference to the application of the boiler inspection statutes and regulations promulgated thereunder as to so-called non-code boilers manufactured in North Carolina. You call our attention to Article 7 of Chapter 95 of the General Statutes which authorizes the creation of the Board of Boiler Rules and the Bureau of Boiler Inspection. Under Section 95-55 of this Article and Chapter, the Board of Boiler Rules is authorized to formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers in this State. These rules and regulations are to conform, as nearly as possible, to the Boiler Code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the Council of the Society. The rules and regulations adopted by the Board in this State become effective on the approval of the Governor. You have also furnished me with a copy of the Rules and Regulations for Boilers established in 1945, and these rules and regulations contain a section on new installations and a section on existing installations.

In view of the statute and the regulations, you submit certain questions as follows:

1. You inquire if it is lawful for a person to operate a non-code boiler manufactured in North Carolina, installed and in operation subsequent to May 7, 1946, even though this boiler does not comply with the Code of the American Society of Mechanical Engineers.
2. You inquire if the Code and Rules of the American Society of Mechanical Engineers apply to new installations of boilers manufactured in North Carolina and installed and operated subsequent to May 7, 1946.
3. Is the operation of a non-code boiler manufactured in North Carolina and installed after the promulgation of the rules and regulations of the Board considered an unsafe boiler to operate and subject to suspension under Rule No. 6?

4. Is a non-code boiler manufactured in North Carolina, installed and operated subsequent to July 6, 1936, *ipso facto* a menace to public safety under paragraph 95-6?

5. Is a North Carolina-manufactured boiler, installed and in operation subsequent to July 6, 1936, *per se* prohibited by Section 95-66?

6. You inquire if the rules of the American Society of Mechanical Engineers are applicable to North Carolina-manufactured boilers as to being inspected during construction by authorized inspectors before approval can be obtained to operate such equipment.

I think the first two questions require the same answer. The Board of Boiler Rules of this State, when it saw fit to adopt its regulations as to new installations, saw fit to make such regulations applicable only to steam boilers brought into this State after November 7, 1945. This was no doubt done because, at the time of the adoption of the regulations, no boilers were being manufactured in North Carolina. It is true that Section 95-66 of the General Statutes states in substance that no steam boiler which does not conform to the rules and regulations governing new installations shall be installed in this State after six months from the effective date of the regulations. This, however, can only be applied to the regulations in existence; and the regulation in existence applies only to steam boilers brought into the State. The Board of Boiler Rules and Regulations did not see fit to adopt any rules and regulations whatsoever that would be applicable to so-called non-code boilers manufactured in North Carolina. The net result, to my mind, is that we do not have any regulations covering boilers manufactured in North Carolina. It follows, therefore, that the answer to the first two questions is that a non-code boiler manufactured in North Carolina, installed and in operation subsequent to May 7, 1946, can be lawfully operated in this State even though the boiler does not comply with the American Society of Mechanical Engineers' regulations.

In the view we have taken of the matter, it would follow, therefore, that the answer to question No. 3 is that the operation of a non-code boiler manufactured in North Carolina and installed after promulgation of Board rules is not *per se* an unsafe boiler to operate and subject to suspension under Rule 6.

The answer to question No. 4 is that the operator of a non-code boiler manufactured in this State and installed and operated subsequent to July 6, 1936, is not *ipso facto* a menace to public safety under Section 95-64.

The answer to question No. 5 is that a North Carolina-manufactured boiler, installed and in operation subsequent to July 6, 1936, is not prohibited by Section 95-66 of the General Statutes.

The answer to question No. 6 is that the rules and regulations of the American Society of Mechanical Engineers are not applicable to boilers manufactured in North Carolina and installed after July 7, 1936, since the Board did not see fit to adopt any regulations for boilers manufactured in this State.

You will no doubt consider recommending some suggestions to the Board of Boiler Rules to cure these regulatory defects since it appears that some boilers are now being manufactured in the State.

OPINIONS TO DEPARTMENT OF MOTOR VEHICLES

MOTOR VEHICLES; GROSS REVENUE TAX; FRANCHISE HAULERS OPERATING
FROM POINTS OUTSIDE THIS STATE TO POINTS WITHIN THIS STATE;
MILEAGE TO BE CONSIDERED ON SUCH TRIPS

13 September 1946

I have your letter of September 6, 1946, in which you state that there are franchise haulers who operate from points outside this State to points within this State. These franchise haulers will have their trucks in one city outside this State in which they will receive orders to transport goods from another city outside this State to a point within this State. An empty truck will be driven from the city in which the order is received to the city in which the goods are to be picked up; the goods will be picked up there and transported to the point of distribution in North Carolina.

In computing the North Carolina six per cent tax, you desire to know whether you should take into consideration the mileage from the city in which the truck is kept, through the city in which the goods are picked up, and thus to the North Carolina destination; or whether you should consider only the mileage from the city in which the goods are picked up to the destination in North Carolina.

Subsection (e) of G. S. 20-88 reads, in part, as follows:

"Franchise haulers operating between a point or points within this State and a point or points without this State shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals."

I am of the opinion that the word "terminals," as used in the above quotation, was intended to mean only the points between which the goods are transported. The money of the hauler is earned by the transportation of the goods, and the price charged the owner of the goods is based on the distance that the goods are transported. I do not believe that the statute is concerned with anything which occurs prior to the time the goods are actually started on their journey. This seems to be the only logical construction which can be placed on the statute.

I, therefore, advise that, in my opinion, only the mileage between the point at which the goods to be shipped are picked up and their destination should be considered by you in computing the North Carolina gross revenue tax.

MOTOR VEHICLES; REGISTRATION; FRANCHISE HAULERS; LEASES;
WHO MUST REGISTER

3 December 1946

You state that recently it has come to your attention that an individual who is not a franchise hauler has leased his equipment to a franchise hauler who has operated said equipment for a portion of a year. Recently

this lessor was found operating the equipment and he remarked that the equipment belonged to him. Upon checking your files you found that there had been a transfer of title from this person, who claims to be a lessor, to the franchise carrier, who claims to be the lessee. The transferee or lessee, in this particular case, registered the motor vehicle with your Department and listed himself as owner.

Many owners of equipment and franchise haulers enter into lease agreements and quite a few of them enter into title transfer agreements. Your inspectors are of the opinion that in a number of cases a transaction which purports to be a transfer of title from an equipment owner to a franchise hauler is, in reality, a subterfuge and not a bona fide transfer of title.

The reason for your interest in this matter is that a franchise hauler pays a lower rate for the registration of the equipment than would the owner who is not a franchise hauler. You inquire if the Department is bound by the fact that its records disclose that a title transfer agreement has been entered into.

Subsection (t) of G. S. 20-38 provides that the owner of a vehicle is the person who holds the legal title to the vehicle and that in case of a lease of a vehicle with the right of purchase, upon the performance of conditions stated in the agreement and with the immediate right of possession vested in the lessee, then the lessee shall be deemed the owner for the purpose of registration. This subsection was amended in 1945 by adding thereto the following:

" . . . except that in all such instances when the rent paid by the lessee includes charges for services of any nature and/or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle, and said vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation."

Thus, when there is a lease without a title-passing provision included therein, the owner of the vehicle is deemed to be the lessor. G. S. 20-50 provides that the owner of a vehicle shall register said vehicle with the Department of Motor Vehicles.

If the owner of the equipment and the franchise hauler have entered into a title transfer contract which is in reality not a bona fide transfer of title, I am of the opinion that the Department of Motor Vehicles would be justified in looking through the arrangements and treating the parties as lessor and lessee. It is true that a taxpayer has a legal right to reduce or to avoid taxes by any means which the law permits. However, I am of the opinion that substance and not form will control and that, if there has not been a bona fide transfer of title, the vendor should be regarded as a lessor and treated as the owner of the vehicle for the purpose of registration. Cf. 51 *Am. Jur.*, *Taxation*, Section 10.

Your attention is also directed to subsection (e) of G. S. 20-111, which provides that it shall be unlawful "to use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application."

If the title transfer agreement entered into by the franchise hauler and the owner of the equipment is not in fact bona fide, it is entirely possible that the provisions of this section would be applicable to the registration of motor vehicles by the vendee.

MOTOR VEHICLES; COURTS; JURISDICTION; VIOLATIONS
OF MOTOR VEHICLE LAWS

4 December 1946

I have your letter of November 29, in which you write me as follows:

"I would be greatly obliged if you would advise me the exact and specific extent of jurisdiction that Justices of the Peace have in this State where the motor vehicle laws are violated and the same extent of jurisdiction with regard to the Recorder's Courts."

A Justice of the Peace has final jurisdiction of criminal offenses wherein the punishment cannot exceed a fine of \$50.00 or imprisonment for thirty days. North Carolina Constitution, Article IV, Section 27; G. S. 7-129. The General Assembly may, and in some instances has, deprived Justices of the Peace of jurisdiction over criminal matters arising within the limits of municipal corporations. STATE v. BASKERVILLE, 141 N. C. 811; G. S. 7-190.

Thus, if the punishment fixed by statute for a violation of any part of the motor vehicle laws is limited to a fine of \$50.00 or imprisonment for thirty days, a Justice of the Peace has jurisdiction to dispose of the case. The following sections are examples of those creating offenses over which Justices of the Peace have final jurisdiction:

General Statutes, Sections—

- 20-50, 20-63 and 20-111 (in so far as they relate to operating motor vehicles without displaying registration plates, unlawful use of registration plates, and permitting the use of registration plates by persons not entitled thereto);
- 20-116 (size of vehicles and loads);
- 20-117 (displaying flags when load extends beyond body of vehicle);
- 20-122 (restrictions as to tire equipment);
- 20-123 (trailers and towed vehicles provisions);
- 20-124 (brakes);
- 20-125 (horns and warning devices);
- 20-126 (mirrors);
- 20-127 (windshield obstructions);
- 20-128 (noise, smoke, and muffler provisions);
- 20-129 (lighting equipment);
- 20-130 (additional lighting equipment);
- 20-131 (head lamps and auxiliary lamps);
- 20-132 (acetylene lights);
- 20-133;
- 20-134 (lights on parked vehicles);
- 20-142 (railroad warning signal violations);
- 20-143 (stopping at certain railway crossings);
- 20-144 (speed limit on bridges);
- 20-146 (driving on right side of highway);
- 20-147 (driving on right side at intersections and railroads);
- 20-148 (meeting vehicles);
- 20-150 (overtaking and passing);

- 20-151 (giving way to overtaking vehicle);
- 20-152 (following too closely);
- 20-153 (turning at intersections);
- 20-154 (signals on starting, stopping or turning);
- 20-155 (right-of-way);
- 20-156 (exceptions to right-of-way rule);
- 20-157 (rules on approach police or fire department vehicles);
- 20-159 (passing street cars);
- 20-160 (safety zones);
- 20-161 (stopping on highway);
- 20-162 (parking in front of fire hydrant, fire station or private driveway);
- 20-163 (motor vehicle left unattended);
- 20-165 (coasting);
- 20-59 (lienor failing to surrender certificate of title held by him when lien satisfied).

The above is not intended as a complete list of statutes creating motor vehicle offenses over which Justices of the Peace have final jurisdiction; however, I believe that most of such sections are included in that list.

It should be remembered that Justices of the Peace also have jurisdiction to conduct preliminary hearings or sit as committing magistrates in all other violations of the motor vehicle laws. G. S. 15-85, *et seq.*

The jurisdiction of the various Recorders' Courts is quite often regulated by special statute. I do not have available an index to the public-local and private laws, and I shall, therefore, limit my discussion to the jurisdiction given to inferior courts by the provisions of the general law.

G. S. 7-185, *et seq.*, provides for the creation of Municipal Recorders' Courts. G. S. 7-190 provides that such Municipal Recorders' Courts shall have exclusive, original jurisdiction of criminal offenses committed within the corporate limits of the municipality in which the court is located, and also those committed within a radius of five miles of such limits, which are below the grade of a felony. Thus, Municipal Recorders' Courts have final jurisdiction of all violations of the motor vehicle laws except those violations which are made felonies by statute. The above statement applies only to those Municipal Recorders' Courts which are created under or have the jurisdiction granted by the sections of the General Statutes referred to. The jurisdiction of any particular Municipal Recorder's Court may be limited by special legislation applicable thereto.

G. S. 7-64 divests all inferior courts of *exclusive* jurisdiction in criminal actions below the grade of a felony and gives the Superior Court concurrent jurisdiction of such offenses. This section does not apply to the Counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Cumberland, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. Here again, however, special acts should be consulted.

G. S. 7-218, *et seq.*, provides for the creation of County Recorders' Courts. Such courts are given final jurisdiction of all criminal offenses below the grade of a felony. If, however, there is already a Recorder's Court established in such county by a special act, then the court established under the above cited section shall not divest such already established court of any of its jurisdiction. On the contrary, the court established under the above cited

sections shall have concurrent jurisdiction with said court already established within the territorial and jurisdictional limits of said court. Thus, a County Recorder's Court has jurisdiction of all violations of the motor vehicle laws except those violations which are made felonies by statute. Local laws should be examined in connection with these courts also.

General County Courts, created pursuant to G. S. 7-265, *et seq.*, have final jurisdiction of all violations of the motor vehicle laws except those which are made felonies. G. S. 7-278(4).

District County Courts, created pursuant to G. S. 7-297, *et seq.*, have final jurisdiction of all violations of the motor vehicle laws except those which are made felonies. G. S. 7-304.

County Criminal Courts, created pursuant to G. S. 384, *et seq.*, have final jurisdiction of all violations of the motor vehicle laws except those which are made felonies and except those which are within the final jurisdiction of a Justice of the Peace. G. S. 7-393(a).

Special County Courts, created pursuant to G. S. 7-405, *et seq.*, have final jurisdiction of all violations of the motor vehicle laws except those which are made felonies. G. S. 7-435.

Those violations of the motor vehicle laws which are made felonies may be tried only in the Superior Courts. A person may be tried for a felony only on a bill of indictment found by a grand jury. *STATE v. SANDERSON*, 213 N. C. 381; *STATE v. CLEGG*, 214 N. C. 675. Indictments and grand juries relate only to the Superior Court.

MOTOR VEHICLES; GROSS REVENUE TAX; LESSOR AND LESSEE; DEDUCTION BY
LESSEE OF LEASE RENTALS PAID TO LESSOR; G. S. 20-89
AND M. V. REG. No. 1

25 March 1947

I regret the delay in answering your letter of January 27, 1947, but my time has been completely consumed in the performance of duties which relate directly to the General Assembly, and the opportunity to reply earlier has not presented itself.

The answer to your inquiry involves an interpretation of G. S. 20-89 as it read prior to its amendment in 1945 and of Regulation No. 1 of the Department of Motor Vehicles, filed with the Secretary of State as required by law on April 14, 1947, and effective as of May 1, 1944. No question is presented for decision under G. S. 20-89 as amended by Section 2 of Chapter 414 of the Session Laws of 1945.

Carrier A leased vehicles from Carrier B and used these vehicles in carrying on its business. In filing reports of gross revenue for taxation purposes, Carrier A made no mention of this lease agreement with Carrier B. The reports of Carrier B did not disclose the existence of the lease agreement. An audit of the books of Carrier B disclosed the lease agreement, and Carrier B stated that Carrier A was reporting the income received from the leased vehicles and paying taxes thereon. An examination of the books of Carrier A disclosed this statement to be true, and the audit of Carrier B was completed and the matter closed. Carrier A now desires to file amended reports showing its gross revenue and claiming as a deduction the portion of the revenue received from the operation of vehicles

leased from Carrier B which is paid by Carrier A to Carrier B under the lease agreement. If Carrier A is allowed to file amended returns, it will be due a refund of taxes, and Carrier B will owe additional taxes to the State. Carrier A bases its claim on part (4) of Regulation No. 1 of the Department of Motor Vehicles, which is quoted below. You inquire if Carrier A should now be allowed to file amended reports and claim as a deduction the portion of the revenue it received from the operation of vehicles leased from Carrier B and paid by it to Carrier B under the lease agreement.

Part (4) of Regulation No. 1 of the Department of Motor Vehicles reads as follows:

"When a franchise carrier leases vehicles from another franchise carrier, each of these carriers will report as gross revenue the amount which it receives from the transaction, showing in its reports and records the amount received by the lessee, the name of the lessor, and the amount paid to the lessor, paying tax on the part retained by the lessee. The lessor will in turn report amount received by him from the lessee and pay the tax on same."

I am of the opinion that the Department of Motor Vehicles should not allow Carrier A to file an amended report or reports to reflect the claimed deduction. G. S. 20-89, as interpreted by this department and administered by the Department of Motor Vehicles, imposes upon the lessee the liability for the gross revenue tax on revenue derived from the operation of leased vehicles. This section reads, in part, as follows:

"All revenue earned both within and without this state from the transportation of persons or property, except as herein provided, by franchise bus carriers and franchise haulers, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as franchise haulers, whether owned by the franchise hauler or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based."

The regulation under consideration was adopted pursuant to authority granted by subsection (b) of G. S. 20-39. This subsection, however, does not authorize the Department of Motor Vehicles to relieve any taxpayer of the liability for taxes imposed upon him by statute. Therefore, the proper interpretation of Regulation No. 1 is, in my opinion, that it does not relieve Carrier A of the liability for the taxes under consideration, but merely provides that if said taxes had been paid by Carrier B, because of an agreement or arrangement between Carrier A and B, the Department would have accepted said payment from Carrier B in satisfaction of the liability of Carrier A. In other words, by the adoption of Regulation No. 1 the Department has said to Carrier A that it would accept *payment* from Carrier B in satisfaction of a portion of Carrier A's liability for gross revenue taxes. The regulation is a declaration by the Department that certain arrangements and agreements between carriers will be recognized *if* the taxes due by the carriers are *paid* when due. This is the only construction of Regulation No. 1 consonant with the taxing statute.

Thus, Regulation No. 1 should not, in my opinion, be construed as authorizing Carrier A to file amended reports and claim the deductions discussed in this letter. If, however, there had been an agreement or arrangement between Carriers A and B under which Carrier B did report the lease rentals as a part of its gross revenues and did pay taxes thereon, Regulation No. 1 would be the Department's authority for recognizing such agreement or arrangement and accepting Carrier B's payment in satisfaction of a portion of Carrier A's tax liability.

Even if the argument hereinbefore advanced in this letter is wrong, Carrier A is not, in my opinion, entitled to file amended reports and claim the deductions herein discussed. An examination of the reports filed covering the period of time during which Regulation No. 1 was in effect discloses that there was no breakdown in said reports disclosing the fact that any equipment had been leased or the amount paid for the same. The books of Carrier A, according to the information available, do not disclose the existence of any lease agreements nor do they reflect the information required by Regulation No. 1. Thus, under no construction of the regulation would Carrier A be entitled to file amended returns and claim the deductions under consideration.

MOTOR VEHICLES; DRIVERS' LICENSES; SUSPENSION; REVOCATION;
PERIOD OF SUSPENSION AND REVOCATION

4 April 1947

I regret that I have not replied to your letter of February 25, 1947, but my time has been completely consumed in the performance of duties relating directly to the General Assembly; and the opportunity to reply has not presented itself before the present time.

You state that a person has been convicted in an inferior court of operating a motor vehicle while under the influence of intoxicants. This conviction was appealed to the Superior Court, and pending the appeal your Department suspended the defendant's driver's license. Some three months elapsed before the case was heard in the Superior Court on appeal. Upon the trial in the Superior Court the defendant was again convicted, and upon receipt of a record of such conviction your Department immediately revoked the driver's license of said defendant. The defendant contends that the revocation should date from the time of the original conviction in the inferior court, and not from the time at which your Department revoked the driver's license as a result of the final conviction. If the defendant's contention is correct, he will receive credit for the time during which his license was suspended in computing the period which must elapse before the Department is authorized to grant application for a new license. You request my opinion as to your authority to allow credit for this time.

G. S. 20-17 provides that the Department of Motor Vehicles "shall forthwith revoke the license of any operator . . . upon receiving a record of such operator's conviction for . . . driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." The Department's authority to revoke a driver's license, in my opinion, may be exercised only upon the receipt of the record of the conviction of an offense specified in G. S. 20-17, and no revocation becomes effective until the Department acts upon the record received.

G. S. 20-19 provides that when a license is revoked the Department shall not "in any event grant application for a new license until the expiration of one year." This year must begin at the time of the official revocation of the license. The fact that the Department has suspended a driver's license under G. S. 20-16 has absolutely no bearing on the period of revocation. Suspension and revocation of driver's licenses are not the same, and the duration of one cannot be used in computing the duration of the other.

Therefore, I advise that in my opinion you have no authority to consider the period for which a driver's license is suspended in computing the year which must elapse before application for a new driver's license may be granted following a revocation of license as a result of a conviction of drunken driving.

MOTOR VEHICLES; CIVIL ACTIONS; SERVICE ON COMMISSIONER AS SERVICE ON
NON-RESIDENTS; COSTS; SUITS *in forma pauperis*

17 April 1947

You inquire if a plaintiff who institutes an action *in forma pauperis* against a non-resident motorist, and has summons served on the Commissioner of Motor Vehicles as attorney of the defendant under G. S. 1-105 or G. S. 1-107, must pay the costs required by the section under which he proceeds at the time the summons is served on the Commissioner.

The fee of \$1.00 prescribed by G. S. 1-105 and the fee of \$5.00 prescribed by G. S. 1-107 are intended to defray the costs of notifying the non-resident defendant that an action has been instituted against him. They are not fees given to an officer, and thus do not fall within the provisions of G. S. 6-24, which provides that no officer shall require his fees of a person who sues as a pauper. I know of no authority for the Commissioner of Motor Vehicles to expend State funds in the performance of this service for the plaintiff in a civil action.

I, therefore, advise that in my opinion such fees must be deposited with the Commissioner of Motor Vehicles in cases in which a plaintiff institutes an action *in forma pauperis* against a non-resident motorist. This opinion affirms an opinion of this office to Hon. A. J. Maxwell of 1 June 1937.

MOTOR VEHICLES; CIVIL ACTIONS; NON-RESIDENT DEFENDANTS; SERVICE OF
PROCESS ON COMMISSIONER; ACCEPTANCE OF SERVICE

17 April 1947

You inquire if the Commissioner of Motor Vehicles has authority to accept service as attorney for a non-resident under the provisions of G. S. 1-105.

G. S. 1-105 provides that the acceptance by a non-resident of the rights and privileges conferred by the laws of this State permitting the operation of motor vehicles over the highways of the State shall be deemed equivalent to the appointment of the Commissioner of Motor Vehicles as the attorney of said non-resident, upon whom *may be served* all sum-

monses, etc., in actions arising out of accidents or collisions in which said non-resident may be involved. The statute then prescribes how service may be made on the Commissioner. The statute does not specifically authorize the Commissioner to accept service.

Statutes like the one under consideration are strictly construed and strict compliance therewith is to be observed. 5 *Am. Jur., Automobiles*, Sec. 591. Strictly construed, G. S. 1-105 does not provide for acceptance of service by the Commissioner of Motor Vehicles as attorney for a non-resident motorist. Our statutes contemplate that personal service of process shall be made by an officer. There can, of course, be a waiver of service by a general appearance in court (G. S. 1-103), or there can be an acceptance of service (G. S. 1-102). *Stevens v. Cecil*, 214 N. C. 217; *Mosley v. Deans*, 222 N. C. 731. I find nothing in the statutes, however, which would authorize the Commissioner of Motor Vehicles to take any action which could affect the rights of a non-resident motorist other than to act as the attorney of said non-resident motorist for the purpose of being served with process in certain actions. He has no authority to waive any of the rights or privileges of the non-resident motorist, and to have service made upon him or his statutory attorney by an officer is a right or privilege of the non-resident motorist.

MOTOR VEHICLES; "FOR HIRE" CARRIERS

25 April 1947

You request my opinion as to whether or not motor vehicles used to haul stone must be equipped with "for hire" licenses under the following circumstances:

The State Highway and Public Works Commission enters into a contract with "A Company" to build a stretch of road. "A Company" sublets to "B Company" the portion of the contract calling for the stoning of the road. "B Company" purchases stone and contracts with "C Company" to haul the stone. "C Company" is to use its trucks and is to load and unload said trucks. "C Company" is also to spread the stone after unloading, or is to pour the stone according to specifications. "C Company" has a contract with two other contractors under the terms of which these contractors are to haul a portion of the stone.

I am of the opinion that the trucks of "C Company" and of the two contractors to whom "C Company" sublets a portion of the stone-moving contract should be equipped with "for hire" licenses. Property-hauling vehicles are required to be licensed, and the fees for such licenses are fixed by G. S. 20-88. "Contract-hauler vehicles" are defined by G. S. 20-38 to be "motor vehicles" used for the transportation of property "for hire." That section also provides that the term "for hire" shall include "every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation." In my opinion this definition is broad enough to include, and does include, motor vehicles used in the manner that the trucks under consideration are used.

In *Travis v. Fry*, 190 So. 793, 139 Fla. 522 (1939), in construing a statute similar to the one under consideration, the Supreme Court said:

"The appellee contends, and we think correctly, that he was not "in the business of transporting property for compensation," strictly speaking, he further contends that that was merely incidental to his contract of installing the transformer. That may in a certain sense, be true, but it appears that he falls within the broad classification of transporting property "for hire" as defined in section 1280, above quoted, such transportation of the heavy transformers being an essential part of his contract, and for which he was compensated by the Power Company, though no particular part of the contract price was allocated to such transportation. The section referred to does not provide that the use of a motor vehicle in transportation "for hire" must be the *principal* work done by the transporter for the owner of the goods hauled. Nor does it matter, under the act, whether the compensation received for the actual hauling is greater or less than that received for the other work.

* * *

"In spite of the fact that this hauling of the transformers was a part only of his main contract, it was such an important and essential part thereof that we have reached the conclusion, on the facts of this particular case, that appellee fell within the classification of a "for hire" carrier, and could therefore be required to secure a permit from the Commission and be made subject to the mileage tax and other requirements applying to "for hire" carriers."

See Annotation, 109 A.L.R. 584, Annotation 80 A.L.R. 574. Cf. *Ex parte Bush* (Cal.; 1936) 56 Pac. 2nd 511.

MOTOR VEHICLES; FINANCIAL RESPONSIBILITY ACT; GENERAL CONSTRUCTION

9 June 1947

I have your letter of June 4, 1947, in which you request my opinion concerning the proper interpretation of Committee Substitute for H. B. 63, commonly known as the financial responsibility law. You submit four questions for answer.

(1) Does the present financial responsibility law, Article 5, Chapter 20 of the General Statutes, apply to judgments rendered after July 1, 1947, in actions involving accidents occurring prior to that date in view of the express repeal of said Article 5 by the Act under consideration?

(2) Do judgments rendered prior to July 1, 1947, and the action taken thereon by the Commissioner of Motor Vehicles pursuant to Article 5 of Chapter 20 of the General Statutes lapse and become void as of July 1, 1947, the date of the repeal of said Article 5?

(3) Does the Act under consideration authorize your Department to require proof of financial responsibility before issuing a new license to, or reissuing the license of, a person whose driver's license has been revoked or suspended prior to July 1, 1947?

(4) Does the Act under consideration authorize your Department to require proof of financial responsibility before issuing a new license to, or reissuing the license of, a person whose driver's license has been revoked or suspended because of a conviction subsequent to July 1, 1947, for an offense committed prior to that date.

For convenience, Committee Substitute for H. B. 63 shall hereinafter be referred to as "the Act."

I

When a judgment is recovered after July 1, 1947, in an action involving an accident which occurred prior to July 1, 1947, it is my opinion that the Commissioner of Motor Vehicles has no authority to suspend the judgment debtor's driver's license and demand proof of financial responsibility before reinstating the same. The amount of the judgment recovered is not material; neither is the failure to satisfy the same. The reasons for this conclusion follow.

There can be no suspension under the Act because it provides in Section 54 that "Persons against whom judgments are obtained subsequent to the effective date of this Act (July 1, 1947), as a result of an action for damages arising out of an accident involving the operation of a motor vehicle prior to the effective date of this Act, are not subject to the provisions hereof."

There can be no suspension under the present financial responsibility law because it is expressly repealed by Section 58 of the Act which is effective as of July 1, 1947. Thus, after July 1, 1947, the Commissioner of Motor Vehicles will have no authority to act under the present law as it will not be in effect. The repeal of an Act of the Legislature makes all proceedings had under it after the date of the repeal absolutely null and void. *Whitley v. Black*, 9 N. C. 179. When the authority to perform an act is derived from a statute, the statute must be in effect at the time the act is performed. *State v. Perkins*, 141 N. C. 797." . . . Where a statute is repealed without a reenactment of the repealed law in substantially the same terms, and there is no saving clause . . . the repealed statute, in regard to its operative effect, is considered as if it had never existed." 50 *Am. Jur. Statutes*, Section 524. See *Helvering v. Newport Company*, 291 U. S. 485, 78 L. ed. 929, 933.

It may be that the basis of the civil action will constitute grounds for suspension or revocation of the judgment debtor's driver's license under G. S. 20-16 or 20-17. If such is the case, the Commissioner should act under those sections just as if the Act had not been adopted. Section 7 of the Act. When action is taken under G. S. 20-16 or 20-17, proof of financial responsibility should be required before reinstating a suspended license or issuing a new license. Section 7 of the Act.

II

When a judgment has been recovered prior to July 1, 1947, in an action involving a motor vehicle accident and the Commissioner of Motor Vehicles has prior to July 1, 1947, suspended the judgment debtor's driver's license and subsequently reinstated same upon proof of financial responsibility, the bond or insurance policy filed to establish financial responsibility does not become void or lose its vitality on July 1, 1947, even though the present financial responsibility law is expressly repealed as of that date. At the time of requiring the filing of the bond or insurance policy the present financial responsibility law was in effect. The Commissioner's action was, therefore, valid in all respects. The repeal of the statute after the Commissioner's action is taken thereunder does not render such action void.

Cf. 50 *Am. Jur.*, *Statutes*, section 531; *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. ed. 550.

The bond or insurance policy filed as required by the Commissioner is not affected by the repeal of the present financial responsibility law. It does not depend upon the financial responsibility law for its validity. Once the bond or insurance policy is filed or executed, it creates certain rights and duties which are contractual in their nature and which are unaffected by the repeal of the law which required the bond or policy to be filed as a condition precedent to the reinstatement of the judgment debtor's driver's license. The present financial responsibility law relates to the filing of a bond or insurance policy and not to the validity of such an obligation or undertaking once it has been filed.

I do not believe, however, that the Commissioner would be authorized after July 1, 1947, to require of a person who has furnished proof of financial responsibility under the present law additional proof of ability to respond in damages as provided in G. S. 20-199. Also, it is my opinion that the Commissioner would have no authority after July 1, 1947, to require additional certificates of insurance carriers to cover additional vehicles to be registered (G. S. 20-200); nor to require that a bond or insurance policy executed prior to July 1, 1947, be renewed thereafter. In other words, I do not believe that the Commissioner would be authorized to take additional steps under the present financial responsibility law after its express repeal. Authority for any action taken must exist at the time the action is taken. *State v. Massey*, 103 N. C. 356.

It is also my opinion that the new Act does not authorize the Commissioner to take any action in connection with a judgment rendered prior to July 1, 1947. It may be argued that the new Act repeals and reenacts the old law thus continuing the old in effect, insofar as reenacted, as to all rights and liabilities thereunder. *Brown v. Brown*, 213 N. C. 347. However, in my opinion the Legislature has expressed an intent that this rule of construction should not apply here. In section 54 of the Act, it is expressly provided that the Act shall not apply to judgments recovered subsequent to July 1, 1947, because of accidents prior to that date. This, to my mind, evinces a legislative intent to "start anew" on July 1, 1947. Apparently, the Legislature meant to "draw the line" on July 1, 1947.

The adoption of the new Act is more of a substitution of new matter for old than it is a reenactment without material change of the present financial responsibility law. The material provisions of the old law and the new Act are not the same.

III

I am of the opinion that when a person's driver's license has been suspended or revoked prior to July 1, 1947, under the Uniform Drivers' License Act, no new license shall issue to such person nor shall the suspended license be reinstated, after July 1, 1947, until proof of financial responsibility is given. Section 7 of the Act provides that "any person whose operator's or chauffeur's license has been revoked or suspended under the provisions of the Uniform Drivers' License Act, as amended, shall not be entitled to have said license again issued or reinstated until such person shall have given and thereafter maintains proof of his financial responsibility, as provided in this Act."

IV

I am of the opinion that when a person's driver's license is revoked or suspended after July 1, 1947, for an offense committed prior to that date, there can be no new license issued to such person and no reinstatement of his old license until proof of financial responsibility is given as required by the Act. The provision of Section 7 of the Act quoted in III above would seem to control here.

The use of the term "has been" in the quoted portion of Section 7 does not, in my opinion, mean that that section applies only to suspensions or revocations which occur prior to July 1, 1947. This section deals with the issuance or reinstatement of licenses not with the revocation or suspension of licenses. When a person applies for a new driver's license, or reinstatement of his old, at the expiration of the term for which his license has been revoked, or suspended, then at that time his license *has been* revoked. "Has been," in my opinion, merely means that at the time of application for a new license or reinstatement of an old license, the department has already revoked or suspended the old license. In other words, the section should be read as of the day when application for reinstatement or for a new license is made. When so read, it is clear that the section applies to revocations and suspensions occurring subsequent to July 1, 1947, as well as before.

As to drivers' licenses which are revoked, Section 8 of the Act furnishes a direct answer. That section reads as follows:

"The Commissioner shall immediately revoke the operator's and chauffeur's license issued to any person, resident or non-resident, upon receiving a record of such person's conviction or forfeiture of Bail in connection with any of the offenses set forth in General Statutes 20-17, and any amendments thereto, and such operator's and chauffeur's licenses shall remain suspended and revoked for at least one year, and shall not be reinstated or renewed thereafter unless and until such person shall have given, and thereafter maintains, proof of financial responsibility as provided in this Act."

It should be remembered that the authority of the Commissioner to revoke or suspend drivers' licenses after July 1, 1947, for offenses committed prior to that date is limited to the Uniform Drivers' License Act. He cannot suspend under the new Act or the present financial responsibility law.

**MOTOR VEHICLES; SPEED; MUNICIPAL ORDINANCES; POWER OF MUNICIPALITY
TO REDUCE SPEED LIMIT IN RESIDENTIAL DISTRICTS BELOW
STATE LIMIT FIXED FOR SUCH AREAS**

28 July 1947

In your letter of July 26, 1947, you make the following inquiry:

"Will you please give me your opinion as to whether a municipal corporation may reduce the speed limit of 35 MPH as provided by the Motor Vehicle Laws for residential districts."

G. S. 20-141 provides, in part, that except as otherwise provided in chapter 20 of the General Statutes it shall be unlawful to operate a vehicle in excess of "thirty-five miles per hour in any residential district." The

term "residential district" is defined in G. S. 20-38, subsection (w) (1.) G. S. 20-141 also provides, in subsection (f), that local authorities may, upon the basis of engineering and traffic investigations, reduce at intersections the speed limits fixed by the general laws. Subsection (g) authorizes local authorities to increase the speed limits fixed by the general laws on through highways, but subsection (h) provides that they shall not increase the speed limit above 50 MPH. The above enumerated grants of authority are the only ones granted to municipalities in connection with the speed of vehicles by the motor vehicle laws.

Municipal corporations may exercise only those powers granted to them by the Constitution or the Legislature. *STATE v. DANNENBURG*, 150 N. C. 799. Any doubt concerning the exercise of such powers is resolved by the courts against the municipality. *STATE v. DANNENBURG*, *Supra*. Also, when a municipal ordinance conflicts with a state law, the ordinance is void. *WASHINGTON v. HAMMOND*, 76 N. C. 33; *STATE v. LANGSTON*, 88 N. C. 692; *STATE v. McCOY*, 116 N. C. 1059; *STATE v. DANNENBURG*, 150 N. C. 799; *STATE v. EUBANKS*, 154 N. C. 628; *STATE v. MEDLIN*, 170 N. C. 682; *STATE v. FRESHWATER*, 183 N. C. 762; See *STATE v. SASSEEN*, 206 N. C. 644, 648. The fact that the ordinance is adopted prior to the enactment of the state law is immaterial. *STATE v. McCOY*, 116 N. C. 1059.

It would seem that the wording of G. S. 20-141 would be sufficient to indicate that insofar as the speed limits are concerned, municipal corporations may act only as that section expressly authorizes. The Legislature has not granted the power to municipalities to reduce the statutory speed limit in residential districts. *Expressio unius est exclusio alterius*.

It is not necessary, however, to rely on general authorities to answer the question presented for the North Carolina Supreme Court has already voiced an opinion on the point. Section 2618 of the Consolidated Statutes read, in part, as follows:

"No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: Provided, that a rate of speed in excess of eighteen miles per hour in the residence portion of any city, town or village, and a rate of speed in excess of ten miles per hour in the business portion of any city, town, or village, and a rate of speed in excess of twenty-five miles per hour on any public highway outside of the corporate limits of any incorporated city or town, shall be deemed a violation of this section."

The City of Burlington adopted the following ordinance:

"That the speed limit on all automobiles, motor cars, electric and steam vehicles of any and all kinds shall not exceed eight miles an hour over the streets in what is known as the fire limits; and through and over any other streets of the City of Burlington the speed limit shall not exceed fifteen miles an hour; that in turning from one street to another, the signal must be given, and that the mufflers on all automobiles shall not be open within the fire limits.

"Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be punished by a fine of \$5; for the second offense, or any subsequent offense, he shall be punished by a fine of \$10; and upon conviction of the third offense the permit to operate automobiles or other motor vehicles shall be canceled."

In declaring the ordinance invalid, the Supreme Court, in *STATE v. FRESHWATER*, 183 N. C. 762, said:

"The ordinance is plainly in conflict with C. S., 2599 and 2618. Section 2601 inhibits the governing body of a municipal corporation from passing any ordinance contrary to the provisions of the chapter in which these sections are found. But without regard to this statutory inhibition, the conflict would be fatal. Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law. The motion to dismiss the action should therefore have been allowed." (Italics added).

This, in my opinion, is decisive of the question presented, and I, therefore, advise that a municipality has no authority to reduce the speed limit of 35 MPH in residential districts fixed by the general laws. Of course, such speed limit may be reduced at intersections under the conditions outlined in subsection (f) of G. S. 20-141.

While municipal ordinances are presumed to be valid, *SUDDRETH v. CHARLOTTE*, 223 N. C. 630, this presumption has been rebutted by the decision of our court in *STATE v. FRESHWATER*, *Supra*, insofar as ordinances which purport to reduce the residential district speed limit are concerned. Thus, it is also my opinion that an ordinance already adopted which purports to reduce such speed limit is void.

MOTOR VEHICLES; CONTRACT HAULER VEHICLES; EXEMPTIONS;
FIRST OR PRIMARY MARKET

1 August 1947

I have your letter of July 30, 1947, in which you ask my opinion as to whether or not "for hire" licenses should be procured for a truck operating under the following circumstances:

Irish potatoes are purchased from the producer at his farm and are transported by truck from the farm to a grader and thence to Washington, Belhaven, or some other place at which potatoes are purchased, sold, and shipped. The purchaser of the potatoes at the farm hires some other person to transport them from the producer's farm to the shipping point, and the potatoes are transported in trucks owned by the person hired to transport the same. Title to the potatoes passes at the producer's farm and the potatoes, during their transportation, are the property of some one other than the producer.

The truck is being operated to haul property for hire and "for hire" license should be procured therefor unless the following exclusion from the definition of contract hauler vehicles is applicable thereto [G. S. 20-38 (r)]:

"Provided, it (contract hauler vehicle) shall not be construed to include the transportation of farm crops or products . . . delivered from farms and forests to the first or primary market."

In my opinion it is not necessary to determine for present purposes the legal connotation of the word "primary" in the phrase "first or primary." The answer to the present inquiry is to be found in the definition of the term "market." This word is defined in *Smith v. New Bern*, 70 N. C. 14,

18, as "a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold." In *Walker v. Faison*, 202 N. C. 694, the term "market" is said to be a place where products are sold. See 38 C. J., *Market*, Sec. 2. In *Webster's New International Dictionary*, second ed., the term "market" is defined as a public place (as in a town) where provisions are sold. The fact that the producer sells his product at his farm does not transform the farm into a place where people meet together to traffic in produce. In reality, the product has never reached a market. True, the title has passed, but it passed at a private location and not at a market. Thus, it is my opinion that the emphasis should be put on the *place* at which title passes *rather than the passing of title itself*. Until a product reaches a public point at which people ordinarily gather to buy such product and to which producers ordinarily carry their product for sale, it has not reached the "first or primary market." "Market," as used in the statute, does not, in my opinion, include a place at which there is an isolated private sale. A product may be sold without being marketed.

I, therefore, advise that in my opinion the truck transporting the potatoes is transporting them to the first or primary *market* and is excluded from the definition of a contract hauler vehicle by the first proviso of subsection (r) of G. S. 20-38.

I return herewith the correspondence which you sent to me.

MOTOR VEHICLES; DEALERS; PERSONS HAVING NO ESTABLISHED PLACE OF BUSINESS

19 August 1947

You have requested that I furnish you with my opinion concerning the authority of a person who deals in motor vehicles to engage in such activity when no permanent place of business is maintained by such person. You refer to the 1947 amendments to G. S. 20-38 and G. S. 20-79.

G. S. 20-38 defines "dealer" as every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, etc., in this State and having an established place of business in this State and being subject to the tax levied by G. S. 105-89. An established place of business is defined by the same section to mean the place actually occupied by a dealer and at which a permanent business of dealing in motor vehicles will be carried on in good faith and at which is kept and maintained the books and records incident and necessary to the conduct of the business. Construing the above mentioned provisions together, we find just what constitutes a dealer in motor vehicles as that phrase is used in the Motor Vehicle Act. Such a dealer is required to apply to the Department of Motor Vehicles for a dealer's license before engaging in business. There is no prohibition in the Motor Vehicle Act against any person, other than a dealer as defined therein, engaging in the business of dealing in motor vehicles.

Subsection 3 of G. S. 105-89 levies a State privilege tax on persons dealing in used vehicles when such business is of a seasonal, temporary, transient, or itinerant nature. This provision, at least by implication, author-

izes individuals to engage in the business of dealing in motor vehicles when no permanent or established place of business is maintained.

In the absence of some proscriptive provision in the Motor Vehicle Act, and in light of the implied grant of authority in the Revenue Act, I advise that in my opinion, a person who does not maintain a permanent or established place of business is not prohibited from engaging in the business of dealing in motor vehicles. It is true that provision is made in the Motor Vehicle Law for the issuance of dealers' plates only to dealers as defined therein. This, however, would not prevent a person other than a dealer as defined in the Motor Vehicle Law from dealing in motor vehicles so long as dealers' plates are not used by such person.

MAXIMUM SPEED LIMITS

19 August 1947

In accordance with your request I list below the present North Carolina maximum legal speed limits:

- (1) Residential Districts (whether within or without corporate limits of municipality) . . . 35 MPH G. S. 20-141.
- (2) Business Districts (whether within or without corporate limits of municipality) . . . 20 MPH G. S. 20-141.
- (3) School busses loaded with children . . . 35 MPH G. S. 20-218.
- (4) Passenger cars, regular passenger carrying vehicles, and pick-up truck of less than one ton capacity, on open highways . . . 55 MPH G. S. 20-141.
- (5) Vehicles other than those listed in 3 and 4 above on open highway . . . 45 MPH G. S. 20-141.

MOTOR VEHICLES; PASSENGER CARRYING BUSES; SPEED LIMIT; AUTHORITY OF UTILITIES COMMISSION TO FIX SPEED LIMIT FOR PASSENGER CARRYING BUSES

25 October 1947

I have your letter of October 24, 1947, in which you inquire as to the speed limit for passenger carrying busses which operate under the supervision of the North Carolina Utilities Commission.

G. S. 20-141 fixes the maximum speed at which passenger carrying vehicles may be operated on the open highway at fifty-five miles per hour. However, G. S. 62-109 provides that the North Carolina Utilities Commission shall have power "to fix and prescribe the speed limit, which may be less but shall not be greater than that prescribed by law" at which motor vehicle carriers may be operated over the highways of the State. This specific provision, in my opinion, controls.

I am not familiar with the regulations of the Utilities Commission and thus I do not know what speed limit the Commission has fixed for motor vehicle carriers. So long as the speed limit fixed by the Commission is not greater than that prescribed by G. S. 20-141, the regulation would control.

The opinion expressed herein is the same that I expressed to J. T. Armstrong some time ago.

MOTOR VEHICLES; RULES OF THE ROAD; AMBULANCES; STOPPING
FOR SCHOOL BUSES

3 November 1947

I have your letter of November 1, 1947, in which you request my opinion concerning certain questions asked you by Mr. H. Lee Thomas of Carthage. Mr. Thomas asks the following questions:

"Does an ambulance driver have the right to pass a North Carolina School bus on a State highway while loading or unloading children with the stop sign out?

"Is an ambulance driver exempt from the State highway speed laws as applied to public school zones?"

G. S. 20-217 requires motor vehicles to stop upon approaching a school or Sunday School bus transporting children to and from school or any church or Sunday School while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state or upon the streets of municipal corporations. I find no provision in the Motor Vehicle Act which exempts ambulances from the requirements of this section. I, therefore, advise that when an ambulance approaches a school bus, which is stopped for the loading or unloading of children, such ambulance must be brought to a halt just as any other motor vehicle.

Ambulances, when traveling in emergencies, are exempt from the provisions of the speed laws. G. S. 20-145. Of course such ambulance must not be operated recklessly.

MOTOR VEHICLES; GROSS REVENUE TAX; FRANCHISE HAULERS; ISSUANCE OF
FRANCHISE BY UTILITIES COMMISSION TO COMPANY NOT HERETOFORE
OPERATING AS FRANCHISE HAULER; REDUCTION OF GROSS
REVENUE TAX FROM 6% TO 4%

10 January 1948

You have requested me to advise you whether, in my opinion, certain trucking companies which are to be classified as common carriers by the Utilities Commission under the new Truck Act (1947, c. 1008) are entitled to pay a gross revenue tax of 4% under the proviso to paragraph (e) of G. S. 20-88 or whether a gross revenue tax of 6% under the other portion of paragraph (e) of G. S. 20-88 should be required. These trucking companies are now operating under temporary permits issued by the Utilities Commission in accordance with applications filed by such companies. The companies involved are (1) Quality Oil Transport, (2) Terminal City Oil Company, (3) Travelers Oil Transport, (4) Royster Transport Company, (5) Washburn Oil Company, Inc., (6) Southern Oil Transportation Co., and (7) Coastal Transport, Inc.

I am informed by the Utilities Commission that the applications filed by the trucking companies which were operating before the effective date of the new Truck Act (1947, c. 1008), are applications to continue the type of operations theretofore carried on and in the same territories. Thus, the applications filed with the Utilities Commission by the companies now under consideration are tantamount to declarations by such companies that they

have heretofore been serving the territory and hauling the commodities which the applications state they desire to serve and to haul under the franchise to be granted by the Utilities Commission. In other words, the companies are claiming rights under the "grandfather clauses" of the New Truck Act.

I have examined the applications filed by the companies now under consideration, and each one is an application to operate between any and all points in North Carolina and over all routes. In addition, it appears from the applications filed with the Utilities Commission that Coastal Transport, Inc., also transports, and desires to continue to transport, in addition to petroleum products, tobacco, brick, tile, fertilizer, steel tanks, and scrap metal. It also appears that Southern Oil Transportation Company desires to transport in addition to petroleum products, caustic soda and fish oil.

G. S. 20-88 requires franchise haulers to pay an annual license tax as per the schedule set out therein "and in addition thereto six per cent of the gross revenue derived from such operations . . ." Subsection (e). This subsection further provides that "in no event shall the tax paid by such franchise haulers be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the Utilities Commission for services *over a route* within the State which is not now served by *any* franchise hauler the six per cent gross revenue tax may be reduced to four per cent for the first two years only." (Italics added).

There are, in my opinion, two reasons why the carriers under consideration are not entitled to pay their State Motor Vehicle Taxes at the rate of 4% of their gross revenue instead of at 6% thereof or the license plates fees, whichever is greater.

I

The exemption provision of G. S. 20-88, quoted above, applies only to carriers which are issued a franchise for services *over a route* which is not being served by any franchise hauler. The carriers now under consideration, according to their applications filed with the Utilities Commission, do not seek a franchise to operate *over a route*. They do not even seek a franchise to serve a district or territory unless the whole state be considered a district or territory. They seek a franchise to operate between all points in the state and over any way or route. Thus, in my opinion, the carriers now under consideration do not fall within the terms of the exemption provision as they do not seek franchises to operate over designated routes.

Also, it is my opinion that the carriers now under consideration do not fall within the spirit of the exemption. I believe that the Legislature intended the exemption provision to serve as an inducement to companies to extend their sphere of operations into new and unserved territories. The provision, to my mind, constitutes a legislative effort to bring property hauling services to all of the people of the state, and the reward to the companies for taking such gambles is a reduction in, or partial exemption from, the gross revenue tax. When service is extended to a portion of the people who are not receiving a regulated service, the fruits or results of the extension are of necessity uncertain. By reducing the taxes of the companies so extending their services, the state has, in a sense, become a partner in the new operations.

The carriers under consideration have operated before over the state and in the very territories which they now seek franchises to serve. They are familiar with the problems with which they will be faced as they have faced them before. This is not an extension of services into the unknown, but a continuation of services which the companies are already rendering. Thus, it seems to me, that the companies under consideration do not fall within the spirit of the exemption.

To any assertion that I am relying on technicalities in the law, the simple answer is that the companies seek an exemption from taxation and exemption provisions of tax statutes are construed strictly. "Taxation is the rule; exemption, the exception, with strict construction applicable to the latter." Stacy, C. J., concurring in *WARRENTON v. WARREN COUNTY*, 215 N. C. 342, 347; 2 S. E. (2d) 463 (1939); *BENSON v. JOHNSTON COUNTY*, 209 N. C. 751, 185 S. E. 6 (1936).

II

From the applications filed by the companies with the Utilities Commission, it appears that the companies under consideration are seeking franchises to operate from all points in the state to all other points in the state. Such extensive operations cannot be engaged in without entering many territories which are now served by franchise haulers. Thus, it is not true that the territory which the companies under consideration seek franchises to serve are not now served by franchise haulers. True, it may be that the territories are not served by franchise haulers transporting petroleum products alone, but they are served by general commodity haulers which may transport petroleum products if they desire to invest in the equipment to do so. In fact, I am informed by the Utilities Commission that during the war many general commodity haulers did transport petroleum products under their general commodity franchises. The statute is not written in terms of particular commodities, but in terms of routes not now served by franchise haulers. So long as a territory is served by a franchise hauler, no new hauler can claim the exemption granted by G. S. 20-88 by merely rendering a specialized service therein which the hauler already there is and has been authorized to render.

As to Southern Oil Transportation Company and Coastal Transport, Inc., it is my opinion that the exemption provision does not apply for the added reason that they will haul other commodities than petroleum products between all points in the state. This territory is already being served by franchise haulers as to these added commodities at least.

MOTOR VEHICLES; REGISTRATION; CERTIFICATE OF TITLE; INNOCENT
PURCHASER FOR VALUE WHO DOES NOT GET CERTIFICATE; FALSE
AFFIDAVITS IN APPLICATION FOR TITLE CERTIFICATE; DUTY
TO INSTITUTE CRIMINAL PROCEEDINGS

14 January 1948

You have requested me to advise you on the legal questions propounded by Honorable H. H. Phillips, Attorney at Law of Tarboro, North Carolina, in a letter to you of January 5, 1948. Mr. Phillips advises that on August 23, 1946, one Willie Ann Williams purchased an automobile from

City Auto Service, Inc., Scotland Neck, North Carolina. At the time of the sale the owner of City Auto Service told Willie Ann Williams that the certificate of title to the automobile was in the possession of J. J. Collie but that he (the vendor) would get the certificate and deliver it to her. On October 31, 1946, J. J. Collie took the certificate of title to a bank and borrowed money on the certificate and executed a mortgage on the automobile. On January 27, 1947, J. J. Collie applied to the Department of Motor Vehicles for a duplicate certificate of title to be issued in the name of Willie Ann Williams and stated in this application that the original certificate of title had been lost. Said duplicate certificate was issued by the department in the name of Willie Ann Williams and was mailed to City Auto Service because of the fact that Willie Ann Williams still owed a part of the purchase price of the automobile.

On October 2, 1947, the bank which had made the loan to J. J. Collie on the certificate of title brought suit to recover possession of the automobile and did recover possession of the same by claim and delivery.

Mr. Philips suggests that you institute a criminal action against J. J. Collie under the provisions of G. S. 20-68(c) and 20-112 because of the false affidavits made by Collie in the application for a duplicate certificate of title. The false affidavit being that J. J. Collie swore that the original certificate of title was lost when in fact he had surrendered it to a bank as security for a loan.

G. S. 20-68(c) reads as follows:

"In the event any certificate of title is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the department, shall immediately make application for and may obtain a duplicate upon the applicant furnishing under oath information satisfactory to the department and payment of required fee. Upon issuance of any duplicate certificate of title the previous certificate last issued shall be void."

G. S. 20-112 provides that "any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this article to be sworn or affirmed to shall be guilty of perjury . . ." This section would seem to make J. J. Collie guilty of perjury if the statement he made under oath in the application for a duplicate certificate of title was in fact false. It does not follow, however, that you as Commissioner of Motor Vehicles should start the criminal action against J. J. Collie. The statute does not impose such a duty on you, and, in my opinion, the Legislature never intended for you to be the instigator of such actions.

When the Legislature imposed upon you (G. S. 20-39) the duty of administering and enforcing the provisions of the 1937 Motor Vehicle Act, it imposed legislative or administrative duties upon you. When the Legislature intends for an administrative official to take the initiative in a criminal prosecution, it usually explicitly says so. See for example G. S. 106-108, relating to the duties of the Commissioner of Agriculture. The Legislature has not so provided in the case of violations of the Motor Vehicle Laws. In addition it seems that you will never be in as good a

position as the parties involved to present the facts. You will only have your records which will show that an affidavit was made, but showing that an affidavit was made does not establish its falsity. You and your assistants and agents would be compelled to go into the various counties of the state and conduct many investigations and present the results of these investigations to the various solicitors of the state. To do this job properly you would not have any time to perform the myriad administrative tasks expressly imposed upon you by statute.

In my opinion you will have performed your duty if you make your records available to the parties and the solicitors of the state, and if you stand ready to appear either personally or through an agent or assistant to make whatever appearance is necessary to get the records before the grand jury or court. The parties involved should, in my opinion, present the facts to the proper solicitor with a request that he investigate and institute criminal proceedings if the facts in his opinion warrant such action. You should, as you of course will, render any assistance to the solicitor that you are able to. This, in my opinion, is what the statute contemplates.

While there has been no request for my opinion on this point, it seems to me that the client of Mr. Philips is the legal owner of the automobile and is entitled to possession of the same. I make this statement because of the distinction between the *legal title* to an automobile and the *certificate of title* thereto. Cf. *Carolina Discount Corp. v. Landis*, 190 N. C. 157, 129 S. E. 414 (1925). Upon the purchase of the automobile by Willie Ann Williams, she became the legal owner thereof without the transfer of the certificate of title. *Corp. v. Landis, supra*. Since claim and delivery is only a provisional or ancillary remedy, the issue of ownership still remains to be determined (*Manix v. Howard*, 82 N. C. 125), and on that issue it seems to me that Willie Ann Williams will prevail under the authority cited above. I do not mean to be presumptuous but it occurred to me that the above case would be helpful.

MOTOR VEHICLES; DRIVER'S LICENSES; DRIVING AFTER LICENSE SUSPENDED
OR REVOKED; NECESSITY OF CONVICTION OF THAT OFFENSE; EFFECT
OF ACQUITTAL OF DRIVING AFTER LICENSE REVOKED

20 January 1948

You have requested my opinion on the following facts:

An individual has his driver's license suspended or revoked by the Department of Motor Vehicles. This revocation or suspension of license is valid in all respects and notice of revocation or suspension has been given to the licensee. Subsequently, the individual is arrested for the illegal operation of a motor vehicle but is not charged with driving after license has been suspended or revoked and the court does not determine whether the individual is guilty of that offense. You inquire if the department has authority to extend the period of suspension or revocation when the department receives notice of the conviction of the individual for such illegal operation (no charge and no disposition of a charge of driving after license has been suspended or revoked). You also inquire if the department has

authority to act in such a case when the individual is charged with operating a motor vehicle after the suspension or revocation of license and there is a verdict of not guilty as to that charge.

After declaring it to be a criminal offense to operate a motor vehicle over the highways of the state after the operator's license has been suspended or revoked, G. S. 20-28 provides that in addition to the punishment therein fixed the "defendant's license shall be suspended or revoked, as the case may be, for an additional period of double the period of the suspension or revocation in effect at the time of his or her apprehension for a violation of this section." This, in my opinion, imposes the duty upon the Department of Motor Vehicles to extend the period of the revocation or suspension when there is an operation of a motor vehicle after revocation or suspension of license. This is not a provision under which the court may impose an additional penalty or additional punishment since the suspension or revocation of a driver's license is not a part of the punishment imposed for an offense committed nor a penalty in addition to the judgment for conviction. The suspension or revocation of a driver's license is merely the forfeiture of a conditional temporary permit for the failure to observe the conditions under which the license was issued. *ANGLIN v. JOYNER*, 181 Va. 660, 26 S. E. 2d 58(1943); *COMMONWEALTH v. HARRIS*, 278 Ky. 218, 128 S. W. 2d 579(1939); *IN RE PROBASCO*, 269 Mich. 453, 257 N. W. 861(1934). The power to suspend or revoke a driver's license is vested exclusively in the Department of Motor Vehicles. *STATE v. COOPER*, 224 N. C. 100, 29 S. E. 2d 18(1944); *STATE v. McDANIELS*, 219 N. C. 763, 14 S. E. 2d 793(1941). Thus, it seems that only the Department of Motor Vehicles is directed or authorized to take action under G. S. 20-28.

It is my opinion that the department is required by G. S. 20-28 to take action when an individual is convicted of an offense, an element of which is the operation of a motor vehicle, after his license has been suspended or revoked and the individual has been given notice of such suspension or revocation. The fact that there was no charge and no disposition of a charge of driving after suspension or revocation of license is immaterial. The statute directs the department to take action when an individual *drives* after suspension or revocation; it does not require a conviction of that offense. A final conviction of an offense, of which the operation of a motor vehicle is an element, is sufficient evidence of the operation of the vehicle and your records will establish the fact of suspension or revocation.

It is also my opinion that the department has no authority to extend the period of suspension or revocation when an individual is arrested after his license has been suspended or revoked and charged with that offense and has been found not guilty by the court. In such a case, a court of competent jurisdiction has considered the question and answered it in favor of the operator. Although your records may disclose a different state of facts, I still am of the opinion that you should abide by the judgment rendered. The fact that the individual is also charged with and found guilty of some other driving offense, such as reckless driving, does not alter the opinion expressed herein. Once the court has passed on the specific question of whether an individual has operated a motor vehicle over the highways of the state after a suspension or revocation of his license, I believe that you should accept the court's answer to the question as binding on you.

MOTOR VEHICLES; FRANCHISE HAULERS; FILM HAULING COMPANIES;
GROSS REVENUE TAXES; DEDUCTIONS; REVENUE DERIVED FROM
SERVICES RENDERED ASIDE FROM TRANSPORTATION

27 February 1948

I have your letter of January 26, 1948, in which you enclose a letter from Mr. John H. Vickers, President of the Carolina Delivery Service Company, Inc., and request my opinion on the question submitted by Mr. Vickers. From Mr. Vickers' letter, it appears that Carolina Delivery Service Company, Inc. (hereinafter, for convenience, called hauler) operates what is termed a film service. This service consists of hauling motion-picture films to various theaters to be used in the theaters to show motion pictures. Some theaters change films more often than others, but the hauler charges the same fee regardless of the number of trips made to the theater. The changes range from two a week to seven a week. In view of this fact, hauler contends that only a portion of its gross revenue is received from the transportation service it renders and that it should be allowed to deduct the remainder of its revenue received from these operations from its gross revenue received from such operations in computing gross revenue for the gross revenue tax.

Subsection (e) of G. S. 20-88 reads in part as follows:

"Franchise haulers shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations."

"Such operations," as used in the above-quoted provision, obviously refers to the operation as a franchise hauler.

From the statements contained in the letter from Mr. Vickers, it appears that the only thing that hauler does is to transport films to and from theaters. Hauler renders for theaters the same service that other carriers render for their customers. The only duty is to haul or transport as required by the theaters. This is the only service that hauler performs or offers to perform, and in this sense, hauler's whole activity consists of rendering a service. This service, however, is the transportation of films—the hauling of property. The statute levies the gross revenue tax on the gross revenue derived from this service or operation.

The fact that hauler charges a flat fee or rate for the service rendered by it does not transform that service from a wholly transportation service to a service which is partially a transportation service and partially another type of service. It is the transportation of the films which the theaters desire and pay for and which hauler offers to do and does. The service rendered and paid for is the hauling of property.

I, therefore, advise that in my opinion hauler should pay a tax on the entire gross receipts from its film hauling operations, and no deduction should be allowed therefrom in computing the taxable gross income.

MOTOR VEHICLES; DRIVER'S LICENSES; DRUNKEN DRIVING; TRIAL FOR
TWO OFFENSES ON SAME DAY

27 February 1948

I have your letter of February 26, 1948, in which you write as follows:

"Relative to our conversation in your office February 24, 1948, I would like to have your opinion on Paragraph 20-19(d) of the Motor Vehicle Laws of North Carolina in respect to a driver who was apprehended and charged with operating a motor vehicle while under the influence of intoxicating liquors on two different occasions, but was brought to trial and convicted as charged, on the same day."

G. S. 20-19 provides that when a license is revoked because of a second conviction for driving under the influence of intoxicants, the Department shall not grant application for a new license until the expiration of three years. This, in my opinion, means that a revocation of license as a result of a second conviction for drunken driving prohibits the former licensee from applying for a new license until three years have expired. As long as the driver is charged with and convicted of a second offense of drunken driving, no application for a new license may be granted until three years have expired. The fact that both convictions occurred at the same time does not prevent one of the convictions from being a second conviction. The statute relates to a conviction for driving drunk a second time and not to a conviction which in point of time follows an earlier conviction. The date of the convictions is immaterial so long as the convictions are for two offenses of drunken driving which took place after July 1, 1947.

MOTOR VEHICLES; USE OF RED LIGHTS ON FRONT OF
PRIVATELY-OWNED VEHICLES

1 March 1948

There is enclosed herewith a letter from Mr. B. C. Nesbitt of the State Highway Patrol.

This office has always thought that letters of this nature should be answered by the head of the Highway Patrol.

Specifically answering the letter from Mr. Nesbitt, you are advised that this office has rendered numerous opinions to the effect that the use of red lights on the front of vehicles is also prohibited except by police cars, highway patrol cars, ambulances, wreckers, fire fighting vehicles or vehicles of a voluntary lifesaving organization which have been officially approved by the local police authorities and manned or operated by members of such organization while on official call.

This does not mean that privately-owned vehicles of members of a voluntary lifesaving organization may be equipped with such red lights. It is the opinion of this office that in order for such vehicles to be so equipped, they must be owned by the organization itself and must be also approved by the local police authorities, and then may only be operated while the members of such organization are on an official call.

MOTOR VEHICLES; FRANCHISE HAULERS; FAILURE TO FILE GROSS REVENUE
TAX REPORTS; PENALTIES; PENALTY WHEN CARRIER HAS LICENSE
TAX CREDIT GREATER THAN AMOUNT OF TAX DUE

10 March 1948

You have requested my opinion on the following facts:

A franchise hauler has a license tax or deposit with the Department of Motor Vehicles which is greater than the 6% gross revenue tax due by the hauler. The hauler does not make its gross revenue report by the twentieth of the month as required by law, but does make a report within a few days thereafter. Heretofore the Department has not been collecting any penalty, and you inquire if this practice should be followed in the future.

I am of the opinion that no penalty is due under such facts. G. S. 20-88, which levies the tax on franchise haulers, contains the following proviso:

"Provided, said additional six per cent shall not be *collectible* unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule." (Italics added).

G. S. 20-91 requires franchise haulers, on or before the twentieth day of each month, to make reports of gross revenue earned and gross mileage operated during the month previous. This section also provides that if a franchise hauler shall refuse or neglect to keep records, make reports, or pay the tax due, the Commissioner of Motor Vehicles shall determine from such information as he may be able to obtain, the tax due from "such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, *to be collected and paid*. The said commissioner shall proceed immediately to *collect* the tax including the additional five per cent (5%)." (Italics added).

The language employed in the above-quoted provision indicates that such provision and the penalty mentioned therein is to be used and applied only when a tax is to be *collected*. From the proviso in G. S. 20-88(e), it appears that the 6% gross revenue tax is *collectible* only when and to the extent that it exceeds the license tax or deposit of the franchise hauler with the Department of Motor Vehicles. Thus, if the license tax or deposit of the franchise hauler with the Department of Motor Vehicles is greater than the gross revenue tax due, no tax is collectible and in my opinion no penalty is due. I feel that the Legislature intended for the penalty to be computed on the tax which is *collectible*. The repeated use of the word "collect" in the provision indicates that it was intended to apply to taxes which are collectible; that is, taxes which are due after the license tax or deposit of the hauler with the Department has been exhausted. This conclusion is buttressed by the provision in the same subsection to the effect that when no records are kept the deposit shall be applied to the tax *assessed* and the remainder of the tax shall be *collected*. Perhaps this is a strict interpretation of the statute, but tax statutes are construed strictly. See STATE v. CAMPBELL, 223 N. C. 828, 830, 28 S. E. (2d) 499 (1943).

This interpretation does not leave the Commissioner powerless to compel the filing of a report when the deposit exceeds the tax due. G. S. 20-91(b) requires the filing of reports in all cases, and G. S. 20-92 provides for cancellation of registration upon failure to file the reports due.

I therefore advise that, in my opinion, no penalty is due when the hauler who fails to file a report on the day when due has a deposit with the Department greater than the tax due. On any amount of tax due in excess of the deposit, a penalty of 5% should be imposed. When a hauler has no deposit, a penalty of 5% of the entire tax should be imposed.

MOTOR VEHICLES; 1947 TRUCK ACT; CONTRACT CARRIERS BECOMING
FRANCHISE CARRIERS UNDER 1947 TRUCK ACT; SIX PER CENT
GROSS REVENUE TAX FOR MONTH OF JANUARY

26 April 1948

You have requested me to advise you whether in my opinion certain contract carriers who have applied for certificates as franchise carriers under the 1947 Truck Act are due to the State the 6% gross revenue tax prescribed by G. S. 20-88 for their operations for the month of January. Your inquiry is based upon facts submitted to you by two carriers. These facts are substantially as follows: Carriers were licensed as contract carriers for the calendar year 1947 and conducted a contract carrier business. Carriers filed with the Utilities Commission, under the 1947 Truck Act, applications for certificates to carry on a franchise hauler business. No definite action has been taken on the applications by the Utilities Commission, but temporary authority to operate as franchise carriers pending final determination of the question has been issued by the Commission. Authority was also issued to purchase franchise carrier license plates from the Department of Motor Vehicles, and such plates were purchased about January 20, 1948 (according to your records), but the carriers made no use of such plates until February 1, 1948.

I am of the opinion that the 6% gross revenue tax is not due by the carriers under consideration for the month of January during which no use of franchise carrier plates was made and no operations as franchise carriers were conducted. The carriers under consideration have received temporary permits as franchise carriers under Section 10 of Chapter 1008 of the Session Laws of 1947, but they have not finally or definitely been classified as franchise carriers. Carriers did not choose to avail themselves of any of the privileges extended to franchise carriers until February 1, 1948. During January, 1948, carriers operated as contract carriers and used contract carrier license plates as they were authorized to do by G. S. 20-65. They did not choose to become franchise carriers until February 1, 1948. If there is a penalty or forfeiture to be imposed for non-user of the rights granted in the temporary permits, such penalty or forfeiture should be imposed by the Utilities Commission under Section 23 of Chapter 1008 of the Session Laws of 1947 and not by the Department of Motor Vehicles.

The 6% gross revenue tax is based upon the gross revenue received from *operations as a franchise hauler*. G. S. 20-88. A franchise hauler is a hauler within the provisions of G. S. 62-103 to 62-121, [G. S. 20-38 (r) (2)],

and a contract hauler is a hauler who does not fall within the meaning of those sections. [G. S. 20-38 (r) (1)]. The two carriers under consideration were licensed as contract carriers and operated as such during January; therefore, they received no revenue as franchise haulers during that month upon which to base the 6% gross revenue tax. It is the operation carried on which determines the tax due, and in the present case the operations were those of contract haulers.

I, therefore advise that in my opinion the 6% gross revenue tax is not due by the two carriers under consideration for their contract hauler operations in the month of January. This opinion does not extend to former contract carriers who chose to use franchise carrier license plates and exercise franchise carrier privileges during the month of January. Such carriers operated as franchise carriers and must pay the gross revenue tax on their revenue.

**MOTOR VEHICLES; GROSS REVENUE TAX; PENALTY FOR FAILURE TO PAY TAX
WHEN DUE; AUTHORITY OF COMMISSIONER TO WAIVE PENALTY**

24 June 1948

I have your letter of June 18, 1948, in which you state that Southern Oil Transportation Company, Inc., (hereinafter for convenience called taxpayer) filed its reports reflecting its gross revenue for April on or before May 20, but did not pay the tax due at that time. Taxpayer purchased licenses costing more than \$400.00 and paid one-half of the cost of said licenses and gave a draft, due June 1st, for the other half of the cost of said licenses. The amount paid for licenses is a credit on the gross revenue tax. At the time when the April gross revenue tax report was filed the principal stockholder of taxpayer was in Florida and taxpayer's bookkeeper filed said report. The bookkeeper believed that the amount of the draft was credited to taxpayer's account at the time the draft was issued resulting in a credit of taxpayer in an amount sufficient to cover the gross revenue tax due for April. The draft was honored when presented to the bank after June 1st and taxpayer's account was credited with the amount thereof sometime between June 4th and June 12th. A portion of this credit was used to satisfy the April gross revenue tax liability of taxpayer and a penalty of \$103.18 was assessed against taxpayer. You inquire if this penalty can be waived.

G. S. 20-90 provides that the gross revenue tax on franchise carriers is due and payable on or before the 20th day of the month following the month in which it accrues. Thus, the April gross revenue tax of taxpayer was due on or before May 20th. While taxpayer's reports were filed on May 20th the tax was not paid and taxpayer did not have sufficient credit with the Department to absorb said liability. This is true because taxpayer's draft was not due until June 1, some ten days after the due date of the tax, and was not in fact honored until sometime between June 4th and June 12th. Thus, the tax was not paid when due and no other arrangement was made to take care of said tax liability.

Subsection (d) of G. S. 20-91 provides that if any franchise carrier shall fail, neglect or refuse to keep such records or to make such reports or pay tax due as required within the time provided in this article, the

Commissioner of Motor Vehicles shall add to the tax due and as a part thereof an amount equal to 5% of the tax. This subsection provides that the Commissioner shall immediately proceed to collect the tax including the 5% additional tax. The provision of this subsection appears to be mandatory and there is no provision in the Motor Vehicle Act authorizing the commissioner to waive this penalty or additional tax.

When, in 1941, the Department of Motor Vehicles was created all of the powers, duties and jurisdiction of the Commissioner of Revenue and the various divisions of the Revenue Department theretofore handling motor vehicle matters, save two, were transferred to the Department of Motor Vehicles. It appears, however, that neither the Commissioner of Revenue nor any of the divisions of the Department of Revenue handling motor vehicle matters prior to 1941 was authorized to waive any penalties assessed against persons paying motor vehicle taxes as distinguished from taxes levied by the Revenue Act. G. S. 105-237 authorized the Commissioner of Revenue to reduce or waive any penalties provided for in the Revenue Act and the motor vehicle taxes were not levied by the Revenue Act. Thus, the Commissioner of Motor Vehicles acquired no power to waive penalties by the enactment of G. S. 20-1.

I, therefore, advise that, in my opinion, the Commissioner of Motor Vehicles is without authority to reduce or waive the penalty assessed against taxpayer.

OPINIONS TO HIGHWAY AND PUBLIC WORKS COMMISSION

AERIAL MAPPING

8 July 1947

I have your letter of July 7, in which you state that at the last meeting of the State Highway and Public Works Commission a resolution was passed authorizing the allocation from the State Highway funds of the sum of \$25,000.00 a year for the two years of the present biennium, to be spent as the proportionate part of the expense of having certain aerial topographical maps made of certain sections of the State for highway purposes.

You further state that it is contemplated that a request to the Budget Bureau will be made to allocate this amount from the State Highway funds and you request my written opinion as to whether the allocation and expenditure of such fund by the Commission is authorized by law.

In conversation with you, I understood it was suggested that the failure of the Legislature to enact the bill which was introduced, providing for an appropriation of a much larger sum by the General Assembly to be paid from the General Fund of the State in cooperation with an allocation to be made by the State Highway and Public Works Commission to be annually provided together with appropriations from the Federal Government for this purpose, might have some bearing upon the right of the State Highway and Public Works Commission to now make this allocation. This bill failed to pass but the bill did not contain any provision authorizing an allocation by the State Highway and Public Works Commission of highway funds for this purpose, as it was assumed that the Commission would, under its general authority, have a right to make this allocation.

It is my opinion that the State Highway and Public Works Commission does have a right to make the allocation from State Highway funds which is contemplated, as the funds to be allocated are essential to the development of the highway program and directly related to the construction of the highways of the State. It is my opinion that the Commission would have the same right to make allocations for this purpose as it would for allocations for mapping the roads of the State in the usual form of surface surveys.

I understand that the aerial mapping, the cost of which is to be paid in part by the Federal Government, would be of great value to the State Highway and Public Works Commission in the performance of its duties with respect to our highways. If in its opinion it is a justifiable expenditure, I think that the allocation may be legally made.

CRIMINAL LAW; JUDGMENTS AND SENTENCES; CUMULATIVE AND CONCURRENT SENTENCES; SUFFICIENT IDENTIFICATION OF PREVIOUS SENTENCE FOR PURPOSE OF CUMULATIVE SENTENCE

14 April 1948

Your letter concerns the sentences of William Goss #36068, now confined in the Central Prison here in Raleigh. You state the facts as to this man's various sentences as follows:

"1. Commitment from the Superior Court of Cabarrus County rendered at the January Term, 1939, he was given a term of ten years for highway robbery to commence January 9, 1939.

"2. While serving this sentence he escaped and was tried in two cases at the January Term, 1941, of the Duplin County Superior Court. The sentence of the first Case #2479 was for 5 years to commence at the 'expiration of sentence he is now serving.'

"3. In Case #2480, which was for highway robbery, he was sentenced for 7 years to commence at the 'expiration of sentence in #2479.'

"He completed serving his 10 year sentence on February 28, 1948. The question posed is whether the 5 year sentence given him in Case #2479, Duplin County, to begin at the 'expiration of sentence he is now serving' is sufficiently clear under the opinion of the case *In Re Parker*, 225 NC 369, to cause it to run consecutively."

It should also be mentioned that your statements of facts above set forth is fully substantiated by the Honorable R. V. Wells, Clerk of the Superior Court of Duplin County, of Kenansville, North Carolina, in his letter to you, dated March 29, 1948. Since the only identification of the sentence given this prisoner from the Superior Court of Cabarrus County is contained in the sentence from the Superior Court of Duplin County and is as follows: "The sentence of the first case #2479 was for five years to commence at the 'expiration of sentence he is now serving,' " you raise the question as to whether or not this is sufficient identification of the previous sentence; and, therefore, as a matter of law, the five-year sentence could run concurrently with the ten-year sentence originating in the Superior Court of Cabarrus County.

As suggested by you, the solution to this question lies in the case of *IN RE PARKER*, 225 N. C. 369. In that case, the prisoner had been convicted in the Superior Court of Lenoir County for the larceny of an automobile and sentenced to the State's Prison for seven years. He escaped and was subsequently convicted in Martin County Superior Court for larceny; and the following sentence was given by the Court: "That the defendant be confined in the State's Prison at Raleigh for a term of three years. This sentence to begin at the expiration of the sentence in Case #C. P. #31355." It was conceded in this case (*IN RE PARKER*) that unless the sentence imposed in the Martin County Superior Court did not begin in law at the expiration of the sentence imposed at the 1935 Term of Lenoir Criminal Court but on the contrary ran concurrently with the Lenoir County sentence, the petitioner had completed the entire period of service under his several sentences. The Supreme Court in this case held that the reference to the sentence of the Lenoir County Court in 1935 was vague and

meaningless and could not be explained by resort to evidence *aliunde*; and, therefore, the sentence could not be sustained as being cumulative in its legal effect. It is further held that the sentence, therefore, was served concurrently and that the prisoner had completed his time of service. In speaking of the certainty that must accompany a sentence, the Court said:

"When he stands before the court, *in invitum* and at arms length with the State, to receive sentence for his misdemeanor; or to shift the picture to a more sensitive spot on the retina, when society, through its authorized agency, undertakes to budget the life of an errant member and take out of it the years forfeit to the law. The policy of the law which will not permit the accused to be convicted of crime unless his guilt is proved beyond a reasonable doubt will certainly interpose to prevent his punishment under a vague and ambiguous sentence—an instrumentality less certain than the proceeding upon which its authority is based.

"It is true, of course, that the intention of the court imposing the sentence should prevail where clearly expressed. 15 *Am. Jur.*, *supra*, s. 465; Anno. 70 A. L. R., 1512. But we do not think this implies that such intention should be sought through evidence *dehors* the record—at least such as is here made necessary;—that it is open to the same sort of proof as if the judge were writing a will or making a contract."

We are of the opinion, therefore, that the sentence of five years imposed from Duplin County in case #2479 began on or about January 29, 1941, and ran concurrently with the ten-year sentence imposed from Cabarrus County. I think it is very noticeable that this case is much weaker than the PARKER case. The PARKER case, at least, did give a reference to a prison record and number which could have been made definite by evidence outside of the sentence itself. If this case, in sentence #2479, there is nothing except that the five-year sentence is to commence at the "expiration of sentence he is now serving." The sentence in case #2480 being for seven years* is properly fixed by the sentence itself as commencing at the expiration of the sentence in #2479. This would seem to be all right and adequately sustains the cumulative service of sentence rather than concurrent. We, however, agree with you that the sentence in #2479 should be interpreted as running concurrently with the ten-year sentence of the Superior Court of Cabarrus County.

CRIMINAL LAW; JUDGMENT; SENTENCES CONCURRENT OR CUMULATIVE

4 June 1948

Your letter concerns sentences of Durwood Joseph Taylor (CP #28696), and you state the facts in regard to these sentences as follows:

"1. He was sentenced for a term from fifteen to eighteen years from the Superior Court of Pitt County in August, 1933. This term is shown by the commitment to have begun August 28, 1933 and according to our records was completed December 12, 1946.

"2. He was sentenced for from ten to fifteen years for robbery with fire arms from the Superior Court of Bertie County August Term, 1933, said sentence to commence 'at expiration of sentence imposed by the Superior Court of Pitt County on August 28, 1933.' (It is my

opinion that this sentence meets the requirements of the Parker Case and is a sentence to run consecutively from the first sentence.)

"3. He was sentenced from the Superior Court of Bertie County for from three to five years for breaking and entering and larceny at August Term, 1933, said sentence to commence 'at expiration of sentence imposed in charge of robbery with fire arms.' (This being a second sentence from the same term of the same court of the same county, in my opinion it is definite enough to meet the requirements laid down by the court in the Parker Case and should likewise be considered to run consecutively.)

"4. He was sentenced to 20 years for assault and robbery from the Superior Court of Lee County in March Term, 1940, which sentence is 'to begin at the termination of the sentence he was serving *at the time he made his escape from Prison Camp.*' This commitment is dated March 25, 1940. This same commitment also carries a twelve-months sentence to run concurrently with the twenty-year sentence given for escape. This short sentence need not be considered at this time."

You inquire specifically as to the sentence set forth in paragraph No. 4 of your statement which involves the question of whether or not the record of the sentence from the Superior Court of Lee County for twenty years should run consecutively or begin at the termination of the fifteen-to-eighteen-year sentence imposed at the August Term, 1933, of the Pitt County Superior Court. This sentence was imposed by the Superior Court of Lee County; and at the time of the imposition of the sentence, the prisoner was serving the sentence from Pitt County and had escaped from prison while he was serving the Pitt-County sentence. The only connection between the two sentences are the words stated in your fourth paragraph in which it is stated that the Lee County sentence, "is to begin at the termination of the sentence he was serving at the time he made his escape from prison camp."

I see very little difference between this sentence and the one that was found to be inadequate in the case of *IN RE PARKER*, 225 N. C. 369. In the *PARKER* case, the language was "this sentence to begin at the expiration of the sentence in Case No. CP #31355." It is stated in the *PARKER* case that no presumption will be indulged in favor of sustaining a sentence as cumulative. It is further stated as follows: "The question here is not merely one of the intention of the judge imposing the sentence, and the method of ascertaining it; it is also a question of the adequate expression of that intent within acceptable standards of certainty in dealing with the liberty and lives of those charged with violations of the law." The Court further points out that in construing a sentence or judgment, the same rule of finding the intention is not applicable as if a will or a contract were being construed; and the sentence is not open to the same type of proof by evidence *dehors* the record.

Applying the principles in the Parker case, I am of the opinion that the sentence from Lee County described in your paragraph No. 4 is not cumulative and does not run consecutively from the fifteen-to-eighteen-year sentence imposed at the August Term, 1933, of the Pitt County Superior Court. It follows, therefore, that these sentences should be considered as running concurrently.

CRIMINAL LAW; JUDGMENT; COMMITMENT; CUMULATIVE AND
CONCURRENT SENTENCES

3 June 1948

You state the facts in regard to certain sentences of Steve Cromwell, alias Jake Cromwell, as follows:

"(1) In March, 1938 he was sentenced for 6-8 years for larceny from the Superior Court of Gates County, the sentence to commence March 30, 1938. According to our records this sentence was completed February 28, 1945.

"(2) At the March Term, 1941, he was sentenced for felonious breaking and entering with intent to commit larceny, for from 7-10 years from the Superior Court of Beaufort County. said sentence to begin 'at the expiration of the prison sentence that the said Steve Cromwell, alias Jake Cromwell, is now serving in the North Carolina State Prison.' According to our records this sentence will expire July 5, 1950."

You further send me a copy of the judgment or sentence rendered at the March Term, 1941, from Beaufort County, in which judgment it is recited by the Court that "it appears to the Court that the defendant, Steve Cromwell, is now serving a sentence in the State Prison for store breaking from Gates County . . ." The Judge further recites in this judgment, in substance, that this prison sentence from Beaufort County is to begin at the expiration of the prison sentence that said Steve Cromwell is now serving in the State Prison. You inquire as to the opinion of this office as to whether these sentences are concurrent or cumulative.

Of course, we are familiar with the case of *IN RE PARKER*, 225 N. C. 369, wherein it is held that for a sentence to be cumulative, there must be an adequate expression of that intent in the judgment and that such intention should not be sought by evidence outside the record. In this case, however, we feel that the judgment itself adequately refers to the previous sentence imposed in Gates County and designates this as the sentence which the prisoner is now serving in the State Prison. In view of this fact, we are of the opinion that this judgment adequately imposes a cumulative sentence; and we do not think that there is that absence or scarcity of reference which caused the sentences to be regarded as concurrent in the *PARKER* case. We agree that the cumulative provision of the sentence imposed in Beaufort County meets the requirements of the law and should be served by the prisoner as a cumulative sentence.

CRIMINAL LAW; JUDGMENT; COMMITMENT; CONCURRENT OR
CUMULATIVE SENTENCE

3 June 1948

It appears that Carl Williams, alias Tom Jackson (CP#27767) was sentenced for seven years in August, 1924. He escaped after serving five months and was not apprehended until 1933. According to the records, he completed the service of this sentence September 29, 1936. While he was at liberty as an escaped prisoner, he was tried and sentenced in Forsyth County for robbery with firearms and was given a sentence of from twelve

to fifteen years to begin "at expiration of sentence now due State. Our information is this defendant owes State five years." This commitment was dated January 11, 1933. If this sentence is counted as beginning January 11, 1933, it was completed November 2, 1947. If it is to be counted as beginning September 29, 1936, it will be completed December 29, 1949. You inquire of this office if these two sentences should be considered as running concurrently or cumulatively.

When these sentences are tested by the doctrine laid down in the case of *IN RE PARKER*, 225 N. C. 369, we do not think there is sufficient or adequate expression or reference to the first sentence in order to make these sentences cumulative. We cannot tell from this judgment which sentence is referred to nor from what county it came. In our opinion, this sentence falls squarely within the doctrine of the *PARKER* case; and the two sentences should be held to be concurrent. In this view of the matter, this prisoner's sentences have been completed.

OPINIONS TO STATE BOARD OF HEALTH

MERIT SYSTEM LAW; MERIT SYSTEM RULE; ARTICLE V, SECTION 4,
PARAGRAPH 1, SUBSECTION 1 OF RULE; DISQUALIFICATION AS TO
CITIZENSHIP; ALIEN WOMAN MARRYING AMERICAN CITIZEN

26 August 1946

In your letter of August 20, 1946 you enclose a copy of a letter written by Dr. B. E. Washburn, District Health Officer. It is stated in Dr. Washburn's letter that Mrs. Denise Bradley, a secretary was planning to take the Merit System examination for the position of typist, such examination will be held on September 28. It appears that Mrs. Bradley is a British subject who married an American soldier while he was stationed in England and came back with him to the United States. The Merit System Council in its announcement of the examination states that applicants for the examination must be citizens of the United States or persons who have made application for citizenship.

Dr. Washburn would like to know, and you likewise present the same question, whether or not Mrs. Bradley became an American citizen because of the fact that she married an American or if she has to take out citizenship papers as any alien would ordinarily have to do upon coming to this country for the purpose of making his or her home.

At one time an alien woman who married an American citizen automatically acquired the nationality or citizenship of her husband. The law in this respect was changed by the so-called Cable Act (8 U.S.C.A., Section 368). An alien woman does not now become a citizen of the United States by virtue of her marriage to an American citizen. Under the provisions of the Federal statute (8 U.S.C.A., Section 711) an alien woman who marries a citizen of the United States and who resides in the marriage state with a United States citizen for at least one year immediately preceding the filing of the petition for naturalization does not have to file any declaration of intention and is only required to reside continuously in the United States for at least two years preceding the filing of the petition.

I am of the opinion, therefore, that this Federal statutory requirement or privilege should be considered by the Merit System Council as equivalent to an application for citizenship since such a person does not have to file a declaration of intention to become a citizen. I do not think, therefore, that Paragraph 1 of the above designated Merit System Rule would apply in this case.

Of course, it is understood that such person must file a petition for citizenship and complete the proceedings within a reasonable time. I think that it is better to file the petition in the office of the Clerk of the United States District Court in the Federal Court district where the petitioner resides. In this case, I think the petition could be filed in the office of the Clerk of the United States District Court either at Asheville or Charlotte. This petition and the proceedings leading up to the acquisition of citizenship are technical matters, and I think they would be rather difficult to complete without legal assistance. If Mrs. Bradley does not file her petition and complete her proceedings within a reasonable time, then the Merit System Council would have no other alternative except to declare the disqualifica-

tion in force and dismiss her from employment. It should be distinctly understood that this ruling applies only to those cases where an alien marries an American citizen.

PUBLIC HEALTH; ADMINISTRATION; AUTHORITY OF THE STATE HEALTH OFFICER TO ENTER INTO CONTRACTS WITH A FEDERAL AGENCY

4 September 1946

You submit to this office a letter from Mr. Joe Jennings, Superintendent, Office of Indian Affairs, Cherokee Indian Agency, Cherokee, North Carolina, dated 20 August 1946, wherein inquiry is made as to your authority as Secretary of the State Board of Health, and State Health Officer, to enter into contract with this Federal Agency for the services of three workers in the Haywood-Jackson-Macon-Swain-Transylvania District Health Department, wherein the Federal Agency is to contribute \$6,300 for the service of these workers. Article 1, Chapter 130, Section 1, and following, of the General Statutes of North Carolina, sets up in this State a State Board of Health and prescribes its powers and duties. Section 7 of this Article and Chapter prescribes the organization of the board and, among other things, provides that the board shall have a secretary who shall also be treasurer. This section further provides that the secretary-treasurer shall be a registered physician of the State and he shall be elected by the board, subject to the approval of the Governor, and that he shall serve for four years and until his successor has been elected and qualified. An executive committee is set up and it is provided in this section that the secretary shall be the executive officer of the board and shall, under its direction, devote his entire time to public-health work, and shall be known as the "State Health Officer."

It is the opinion of this office, under the above statutes, that as executive officer of the executive committee of the State Board of Health, and as State Health Officer, you have authority to act for and on behalf of the State Board of Health in all matters pertaining to the administration of the health laws of this State subject, of course, to the instructions given to you, and to such rules and regulations as have been or may hereafter be promulgated by the State Board of Health.

PUBLIC HEALTH; ABATTOIRS

6 September 1946

This is in reply to your letter of September 4, 1946 in which you request a ruling from our office upon circumstances and facts set forth in a letter sent to your agency by Dr. H. C. Whims, Buncombe County Health Officer. You attach copy of Dr. Whims' letter to your letter.

It is stated that the county health officer has been investigating the abattoirs in his county. It is further stated that one of the rather active slaughterers in the county prefers to discontinue his own business of conducting an abattoir but desires to make his present establishment available to his neighbors without charge, so they can kill animals that they have raised for their own use or for sale. The health officer would like to know if an establishment operated without charge and made available to the neighbors in the community would be considered an abattoir within the meaning of

the laws of this State and the rules and regulations promulgated thereunder. The health officer in substance would like to know if the maintenance of such a place which does not meet the sanitary requirements is lawful.

Section 130-264 of the General Statutes is as follows:

"For the better protection of the public health, the state board of health is hereby authorized, directed and empowered to prepare and enforce rules and regulations governing the sanitation of meat markets, *abattoirs*, and *other places* where meat or meat products are *prepared*,

Section 130-264 of the General Statutes is as follows:

handled, stored, or sold, and to provide a system of scoring and grading such places. No such meat market or abattoir shall operate which receives a sanitary rating of less than seventy per cent (70%): Provided, that this article shall not apply to farmers and others who raise, butcher and market their own meat or meat products." (Italics ours).

The State Board of Health is therefore empowered to prepare and enforce rules and regulations governing the sanitation of *abattoirs and other places* where meat or meat products are prepared, handled or stored. By virtue of Section 130-266 of the General Statutes, any violation of the statutory provisions or of any of the rules and regulations that may be provided under the article is declared to be a misdemeanor; and upon conviction, the violator may be fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00), or imprisoned in jail for not less than thirty days at the discretion of the court.

The rules and regulations adopted by the State Board of Health on May 4, 1938 pursuant to this article defines abattoir as follows:

"An abattoir is any slaughtering, meat-canning, curing, smoking, salting, rendering, or other similar establishment. (Farmers and others who raise, butcher and market their own meat and meat products are exempted by Section 1, of the Act.)"

Under these rules and regulations, meat is defined among other things to mean and include any part or parts of the edible portion of swine and other animals that are ordinarily slaughtered in abattoirs and sold or used as food for human consumption.

According to Webster's International Dictionary, an abattoir and a slaughter house are synonymous terms. The definition of an abattoir set forth in the rules and regulations includes any establishment in which slaughtering is done, meat canning or any of these operations whether performed individually or in combination. The word "establishment" used in the definition is defined in 30 C. J. S., p. 1233 as follows:

"In the common understanding of the word, it is most simply defined as meaning something established; hence, an institution; an institution, place, building or location; **more specifically, a fixed place where business is conducted, or a place where the public is invited to come and have its work done**" (Italics ours).

From what I have said above, I think it is clear that the maintenance of such an establishment as described in the health officer's letter is an abattoir within the definition as set forth in the statute and in the rules

and regulations heretofore issued thereunder. I specifically call to your attention that while the statute uses the word "abattoirs," it also describes as being within the meaning of the law "other places where meat or meat products are prepared, handled, stored or sold." It is maintenance, operation and the permission given by a person to other persons to use such a place and allowing the place to be held out to the neighbors as a place where meat products can be prepared that constitutes the operation of an abattoir or a place where meat products are prepared and handled, etc. You will further notice that the statutes and the regulations are silent as to whether or not a charge is made for using the place or for preparing the meat. The fact that a man chooses to allow such an establishment to be used or operated without profit or charge, in my opinion, does not remove the place from the decisions and operations of the statute and the regulations. The fact that a charge is made either in money or a portion of the animal products does not affect the situation. The places within the operation of the statute are not defined in terms of profit or non-profit. It is rather the character of the operation which is determinative of the application or non-application of the statute.

It is true that the law applicable to abattoirs and establishments where meat products are prepared does not apply to farmers who raise, butcher, and market their own meat and meat products. This exemption was intended to apply to farmers who do their slaughtering on their own farms or who in isolated and incidental cases do their slaughtering on the farm of a neighbor who has some equipment for such a purpose. The exemption was never intended to apply to any person or place which can be used in common and where there is a direct or indirect invitation to the neighbors in general to make use of the facilities. The farmers' exemption is a personal exemption and not an exemption of place. A person who permits a place to be used in common by neighbors as a central point for slaughtering and butchering does not come within the definition of a farmer who is raising, butchering, and marketing his own meat.

I am of the opinion, therefore, that the situation mentioned in the health officer's letter of the maintenance or permission to use a place for the purpose of butchering animals comes within the meaning of the statute, and the law with reference to abattoirs as well as the rules and regulations thereunder applicable to such a place. Such a place or establishment, in my opinion, is required to meet the sanitary requirements applicable to abattoirs and other slaughtering places.

PUBLIC HEALTH; DISTRICT BOARD OF HEALTH; FIDELITY BOND OF FISCAL
AGENT OR DISBURSING AGENT; CUSTODY OF BOND; NECESSITY OF
COUNTY ACCOUNTANT WHO IS ALSO DISBURSING
AGENT TO FURNISH BOND

7 September 1946

In your letter of September 5, 1946 you enclose bond submitted to you by Dr. Alfred Mordecai; you also enclose copy of contract entered into between the State Board of Health and the board of county commissioners for the purpose of financing a district health department.

You would like to know if these bonds executed for the safeguarding of the funds and expenditures of the district health department and to guarantee the proper accounting of the disbursing agent should be made to the State of North Carolina or to the district health department. You further ask if the custody of the bonds should be with the State Board of Health or with the district health department.

We have reviewed the contract and the bond in this case, and we are of the opinion that the bond should be executed to the particular district health department in question and not to the State of North Carolina. Where bonds are executed to the State of North Carolina for the proper performance of the duties and accounting of certain public officials, we find that it is usually required by statute that the bonds should be executed in favor of the State. We do not have that situation presented in your letter. The position of disbursing agent of a district health department is created by the contract between the parties. It is not a statutory position, and the requirement that a bond be furnished is a precaution required by the parties and not by statute. Under this situation, it is our opinion that the bond should be made in favor of the district health department and not the State of North Carolina.

The bond before me executed with Dr. Alfred Mordecai as principal and the American Surety Company of New York as surety, in my opinion, does not conform to the situation with which we are dealing and should be immediately changed or a new bond should be executed. You will note that this bond recites in the condition clause that "Alfred Mordecai has been appointed District Health Officer for the Counties of Davie, Stokes and Yadkin for a period of two years expiring June 30, 1947." We are not concerned with a bond for Dr. Mordecai as district health officer. What we are concerned with is a bond for Dr. Mordecai as disbursing agent of this district health department; therefore, this designation, in my opinion, must be changed at once so as to reflect the true situation. The bond further reads: "Now, therefore, if the said Alfred Mordecai shall *faithfully perform the duties of his office during said term, etc.*" It is my thought that the bond required for this purpose should not only be conditioned upon the faithful performances of the duties of a disbursing agent of this district health department, but it should also contain this language: "And shall well and truly account for and pay over all funds which may come into his hands by virtue of his position of disbursing agent of _____ District Health Department and shall well and truly pay over and account for all funds which may come into his hands by virtue of and under cover of his position and office, the above obligation to be null and void, etc."

I would advise you, therefore, to see that these bonds are changed to reflect this true situation. We do not want for this purpose a district health officer bond, but we want a bond for a disbursing agent who incidentally happens to be a health officer in this case.

You ask one further question arising upon the fact that one district health department has designated as fiscal or disbursing agent the auditor of one of the counties who is already bonded for handling the county funds. You would like to know if an additional special bond must be furnished by him or if he can furnish a notarized statement that he is already bonded adequately and that this bond will cover health department funds. I do not

see how a bond that any county accountant would enter into for the proper handling and accounting of county funds could cover his accounting and paying over properly the funds he would handle for a district health department. The funds of the county handled by him represent one situation, and the funds handled by him for the district health department is entirely another situation. I am of the opinion, therefore, that it would be necessary for this county accountant to furnish an additional special bond for the benefit of the district health department in question.

As to the custody of the bonds, I am of the opinion that these bonds should be held and retained by the various health departments or district health departments in question. The bonds are for the benefit of these health departments, and I do not think that the State Board of Health should be responsible for their custody.

VITAL STATISTICS; CERTIFIED COPIES OF CERTIFICATES; FEES
WHICH MAY BE CHARGED

16 October 1946

In your letter of the 15th of October, 1946, you refer to G. S. 130-102, and inquire if under this section the Division of Vital Statistics is entitled to a fee of fifty cents for furnishing a certified copy of any birth or death certificate, and in addition if the Division is entitled to a fee of fifty cents for each hour consumed in searching the records provided for in the section.

The pertinent parts of the law in this respect are as follows:

"The state registrar shall, upon request, supply to any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. . . . For any search of the files and records when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional part of an hour of time of search, said fee to be paid by the applicant."

From the language of the above statute, it would appear that your Division is entitled to the fifty-cent fee in those cases where a certified copy of the certificate has been requested and no more, regardless of the length of time consumed in searching the records in order that such certified copy may be furnished. It is only in those instances where no certified copy is requested or made, but a search has been requested for the information, that the fee of fifty cents for each hour or fractional part of an hour consumed in said search has application.

PUBLIC HEALTH; AUTHORITY OF STATE BOARD OF HEALTH TO PAY PRO RATA
SHARE OF COST OF POLICE SERVICE, FIRE SERVICE, AND SANITARY
SERVICE FURNISHED BY CITY OF CHARLOTTE FOR MORRIS FIELD

3 December 1946

In your letter of November 29, 1946, it is stated that the City of Charlotte proposes to lease to the State Board of Health certain buildings and grounds at Morris Field for the sum of \$1.00 per year as actual rental and

a further consideration that the State Board of Health contribute to the budget of the City of Charlotte, or in other words, reimburse it to the extent of 7.2 per cent of the total expense for police service, fire service and sanitary service. These totals are stated in your letter, and the ratio or percentage has been figured on the basis of the number of square feet involved. In addition, it has been suggested that your department bear the cost of insurance on the seventeen buildings which you will occupy. The cost of insurance is stated in your letter. It is further stated by you that the funds making up the budget for the Western Medical Center are taken entirely out of the Federal funds.

You would like to know if the State Board of Health has authority to enter into a lease under these conditions.

We have considered this matter at conference, and we are of the opinion that the State Board of Health, under the conditions stated in your letter, does have authority to enter into such a lease. It should be stated in the lease, however, that these contributions which you are paying for fire service, sanitary service, etc., are a part of the consideration for the execution of the lease. In other words, this specific consideration should be stated in writing in the lease. As to the question of the State's being a self-insurer and no longer authorized to enter into contracts with private companies, we do not think that the State law on that subject is applicable here because the property and buildings in question is not owned by the State. If I correctly understand the law as to State insurance, the provisions are now applicable only to property held and owned by the State. I, therefore, see no legal obstacle to your furnishing the City of Charlotte with the money for insurance premiums on the buildings and grounds at Morris Field occupied by you for the Western Medical Center.

VITAL STATISTICS; REGISTRATION OF NORTH CAROLINA CHILD BORN IN
ENGLAND; MARRIAGE; RECORD OF MARRIAGE; LEGITIMATION OF
ILLEGITIMATE CHILDREN; CITIZENSHIP OF A CHILD BORN IN
ENGLAND WHOSE FATHER IS AN AMERICAN CITIZEN AND
WHOSE MOTHER IS AN ENGLISH SUBJECT

13 December 1946

I reply to your letter of December 10, 1946.

It appears that you have received a letter from Staff Sergeant Moser of the United States Army, stating in substance that he is the father of a child born in Cornwall, England, October 19, 1944. At that time, because Sergeant Moser was in a combat division, the invasion of France intervened with his plans to marry; and, therefore, Sergeant Moser and the mother of the child were not married when the child was born. The birth certificate of the child does not show Sergeant Moser's name as this was left off because of certain personal complications that might be involved. Sergeant Moser, however, married the mother of the child on September 12, 1946, in Camelford, Cornwall, England.

Sergeant Moser has sent your department the following questions:

"How do I make my son legally mine and what is his status as an American citizen? As I am a permanent resident of the State of North Carolina, I would like to have my marriage and the birth of my son

registered there. I request that I be sent the necessary forms for recording of birth and marriage and any information pertaining to the recording of aforementioned birth and marriage."

So far as any question of legitimation is concerned, and especially with reference to the laws of this State, it is our opinion that the marriage of Sergeant Moser and the mother of the child makes his son a legitimate child. Section 49-12 of the General Statutes is as follows:

"When the mother of any illegitimate child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."

It would seem, therefore, so far as the laws of this State are concerned, there is no trouble about his son's being considered a legitimate child and this status of legitimacy attached at the time of the marriage; and it further seems to me, this being the law of our State, it would be recognized by other states.

The request of Sergeant Moser, however, to have his marriage and the birth of his son registered here raises another question entirely. Our laws pertaining to vital statistics apply only to children born in this State. So far as I know, the Bureau of Vital Statistics in this State has no jurisdiction over and has no authority to record or register the birth of a child born in another state in this nation or in a foreign country. This is plainly shown by Section 130-85 of the General Statutes which says: "The birth of every child *born in this state* shall be registered as hereinafter provided." (Italics ours). So far as I know, therefore, there is no authority or law whatsoever to register the birth of this child in this State. The same applies to the proposition of recording or making a record of his marriage. When a marriage license is issued in this State by the register of deeds, he makes an official record of the issuance of the license and the return of same; and marriage certificates can be issued thereon, but this applies only to marriages performed or celebrated inside the State of North Carolina. So far as I know, we do not have any law which permits a man who is married in another state or in a foreign country to record any certificate or evidence of his marriage in this State just as he would record a deed or mortgage or such other papers. If Sergeant Moser has a marriage certificate issued by the authorities in England, he has sufficient evidence of his marriage.

As to whether or not the child of Sergeant Moser should be considered a citizen of the United States, this raises a question of nationality at birth which is governed by the Federal laws and statutes. Our office is a State office, and it is our duty to interpret and apply State laws. We, therefore, cannot give any authoritative opinion on this subject. Sergeant Moser should get in touch with his Veteran's Legal Aid organization, and the Legal Aid organization will no doubt seek the advice of the District Attorney of the United States or an opinion from the office of the Attorney General of the United States. My own personal opinion is that under the provisions of Title 8, U.S.C.A., Section 601,605 (Aliens and Nationality), there is a strong probability that the child of Sergeant Moser would

be considered a citizen of the United States since at the time of the birth of the child, he was a citizen of this country. As I have stated before, however, this is not a question for the State authorities to answer.

PUBLIC HEALTH; AUTHORITY OF AGENTS OF STATE BOARD OF HEALTH TO
MAKE SANITARY INSPECTIONS OF PLACES WHERE MILK SHAKES ARE SOLD

17 July 1947

Your letter relates to the sale of milk shakes in certain areas of the State. It appears that milk shake mix is manufactured by dairy products companies and distributed by these concerns. The mix is already prepared, having been processed in milk plants meeting the requirements of local milk ordinances. The retailers of this product place it in milk shakers, possibly add some flavoring and probably sell these products as milk shakes.

You inquire if the State Hotel and Cafe Law covers the operation of these places where milk shakes are sold; and if not, you raise the question as to whether or not the State Department of Agriculture, under their Pure Food and Drug Division, would have jurisdiction over the sale of such mixtures.

Section 72-46 of the General Statutes, dealing with the sanitation of establishments providing food and lodging, such as hotels, cafes, etc., is as follows:

"For the better protection of the public health, the State Board of Health is hereby authorized, empowered, and directed to prepare and enforce rules and regulations governing the sanitation of *hotels, cafes, restaurants, tourist homes, tourist camps, summer camps, lunch and drink stands*, sandwich manufacturing establishments, and all other establishments where food is prepared, handled, and served to the public at wholesale or retail for pay, or where transient guests are served food or provided with lodging for pay. The State Board of Health is also authorized, empowered, and directed to prepare a system of grading all such places, and no such establishment shall operate which receives a grade less than C." (*Italics ours*).

A reading of this statute seems to indicate that food and drink are distinguished from one another; and it is, therefore, highly doubtful if this statute could be construed as covering a milk shake, which is a drink under the heading or definition of food. No doubt, such a drink contains ingredients which could be classified under the generic term of food. The statute, however, seems to divide or draw a line between food and drink because you will notice that in enumerating the places that may be inspected, the statutes use the term "lunch and drink stands." Apparently, therefore, food in the form of lunches and drink must be served at the same place before the power to inspect a drink stand could be exercised. The emphasis in the statute seems to be upon solid foods and only upon drinks when served as incidental to such foods.

I am of the opinion, therefore, that it is highly doubtful if you have authority to make inspections of places where milk shakes alone are sold; and I would not advise your department to assume such jurisdiction. It seems to me that this is a question for the local health authorities and

that they have ample power and jurisdiction to make such inspections and deal with those places found to be unsanitary. The local health authorities have much more knowledge of such conditions, and it seems to me that there is no doubt but what local authorities have the legal power to take appropriate action.

As to the powers exercised by the Pure Food and Drug Division of the Department of Agriculture, it seems to me that this Division is more concerned with the purity of food as related to the purity of its ingredients and that they are not concerned with the sanitary conditions surrounding the service of the food.

PUBLIC HEALTH; ABATTOIRS AND MEAT MARKETS; AUTHORITY OF THE
AGENTS OF THE STATE BOARD OF HEALTH TO INSPECT THE PLACES
WHERE PACKAGES OF MEAT PRODUCTS ARE SOLD AT RETAIL;
RETAIL SALE OF MEAT PRODUCTS DISTRIBUTED
FROM FROZEN LOCKERS

17 July 1947

In your letter you state your problem as follows:

"It has come to our attention that in some sections of the State meat processors, that is markets, frozen lockers, or abattoir operators are preparing meat in small packages, for example pound packages of pork chops. These are then frozen and are later distributed to country grocery stores, filling stations, and the like, where the operators of these places attempt to keep this food product in ice boxes, or freezer cabinets. The packages are then sold to the consumer without any further handling or processing on the part of the operator of the place of business.

"The question has been raised as to whether or not the State Meat Market and Abattoir Law and Regulations are broad enough to cover the sanitation of the places from which this meat is finally sold to the consumer. Representatives of this office, and of the local Health Departments, check the sanitation of meat markets and locker plants, and abattoirs, where the meat is originally processed and packaged. There is some doubt in our mind as to whether or not we would have any jurisdiction over the places which buy this meat from packaging plants or processing plants for resale to the public. There are, of course, public health problems involved, such as adequate refrigeration, proper storage, and handling. We are also of the opinion that should any trouble develop with these packages of meat, caused by improper cooling or freezing, that the State Department of Agriculture, Pure Food and Drug Division, would have supervision, or the right to condemn this product as being unfit for human consumption, because of spoilage."

Your question, therefore, is whether or not, under the inspection statute dealing with meat markets and abattoirs and the regulations issued pursuant thereto, your agents have the right to make a sanitary inspection of these retail places in which this meat is finally sold to the consumer.

Under Article 24 of Chapter 130 of the General Statutes, the State Board of Health has a right to promulgate rules and regulations and enforce the same in regard to the sanitation of certain meat markets and abattoirs, and the statute reads as follows:

"For the better protection of the public health, the State Board of Health is hereby authorized, directed and empowered to prepare and enforce rules and regulations governing the sanitation of meat mar-

kets, abattoirs, and other places where meat or meat products are prepared, handled, stored, or sold, and to provide a system of scoring and grading such places. No such meat market or abattoir shall operate which receives a sanitary rating of less than seventy per cent (70%): Provided, that this article shall not apply to farmers and others who raise, butcher and market their own meat or meat products."

It seems to me that this statute is directed towards the inspection of meat markets and abattoirs where the meat is originally processed, handled, packaged, stored or sold; and it does not contemplate a mere retail outlet where the meat has theretofore been packaged, processed or stored and then distributed to the retail outlet. The statute is more concerned with the sanitation of the place where the meat originally was processed and packaged and perhaps stored in freezer lockers or some other method of refrigeration is used. The sanitation of the place of original production is considered more important than the sanitation of some place where the meat is merely distributed after the processing has come to an end. Where the meat is processed at freezer locker plants, it is clear to me that you have a right to enforce such sanitary regulations; but where the processing has come to an end and there is nothing involved but the sanitation of a place which is a mere point of distribution by the retail sale of the merchandise to the consumer, then I do not think that you have a right to make such inspections and to enforce the Meat Market and Abattoir Law and Regulations as to these retail outlets. There could, of course, be instances where meat is partially prepared at one place and then sent to another place where it is further processed and handled, and the Meat Market and Abattoir Act would apply. I would advise, therefore, that under the present state of the law and regulations that you do not attempt to enforce your inspections as to purely retail outlets as described in your letter. Of course, if these meat products decompose and thereby become unfit for food, then I think a problem arises over which the Pure Food and Drug Division would have jurisdiction. It seems to me that this Division has a right to intervene where deleterious foods are sold.

PUBLIC HEALTH; VITAL STATISTICS; NEW CERTIFICATE OF BIRTH FOR
ADOPTED CHILD; DUTY OF REGISTER OF DEEDS AS TO
OLD CERTIFICATE

18 July 1947

You refer to Section 48-7 of the General Statutes, which is composed of Chapter 243 of the Acts of 1935, Chapter 155 of the Acts of 1945. Where a child is adopted and the court decrees that the name of the child shall be changed, this statute requires the Bureau of Vital Statistics to prepare a new birth certificate for the child with certain information, including the name of the adoptive father and maiden name of adoptive mother as the parents of the child. No reference can be made in the new certificate to the adoption of the child nor can the adopting parents be referred to as foster parents. The State Registrar is required to place the original birth certificate and all papers pertaining to the adoption under seal, and this seal cannot be broken except by order of court. It is further required that the State Bureau issue certified copies of birth certificate based upon this

new birth certificate unless a court orders the issuance of a copy of the original certificate. The statute then says, in the last sentence: "The State Registrar shall forward a copy of the new certificate to the register of deeds of the North Carolina county where the proceeding for adoption was instituted."

Your problem arises in connection with those instances where the county of adoption is also the county of birth. In such instances, the original certificate, filed with the register of deeds, is in his files; and when the child is adopted, he also receives the new certificate, as I have outlined above. This results in a situation where information is on file in the register of deeds' office which the statute plainly does not desire to be available to the public because, as we have said above, the original certificate in the State Registrar's office is placed under seal and cannot be opened except by an order of court. In other words, if both certificates are to be on file in the office of the register of deeds, where the county of birth and the county of adoption are the same, then the object of the law is entire defeated.

You would like to know the legal duties and application of the statute to the office of register of deeds where such situations exist.

You will notice that Section 48-7 of the General Statutes (Cumulative Supplement of 1945) is entirely silent as to what the register of deeds shall do with the new birth certificate after he receives it in his office. I think, however, that Section 48-5 must be construed in conjunction with Section 130-94 of the General Statutes. You will note that Section 130-94 gives the conditions under which a new certificate of birth can be issued or made by the State Registrar. Paragraph (b) provides that such new certificate can be issued when the clerk of court notifies the State Registrar of a judgment, order or decree disclosing different or additional information relative to the parentage of a person; and under Paragraph (c), a new certificate can be issued where satisfactory proof is submitted to the State Registrar of a judgment, order or decree of a court of competent jurisdiction disclosing different or additional information relative to the parentage of a person. It seems to me that the Adoption Act intended to place adopted children on the same basis as the new certificates, and likewise their adoptive parents on the same basis, as when new certificates are issued in cases of actual parents, which is governed by Section 130-94. In other words, Section 48-7 is an enabling statute and is to be construed with and as a part of Section 130-94. Section 130-94 requires that the register of deeds, when a copy of the new birth certificate has been filed with him, shall note this change of information on the copies of the certificate of birth on file with him, if any. I think, therefore, that the register of deeds is authorized to substitute his copy of the new birth certificate in place of the old birth certificate on file in his county and that he should do so. I am sure that he is to note the changes on his old certificate, and I see no reason why the substitution of the new certificate and the destruction of the old certificate would not accomplish this purpose.

Of course, my opinion as to what the register of deeds should do is only advisory; and if some register of deeds is of the opinion that he should only note the changes on the old certificate and leave the original information on the old certificate at the same time, then I could not say that he would be entirely wrong as the statute is not free from doubt. I do think,

however, that the law intended that the old certificate, with its information, should be destroyed in the register of deeds' office or the information on the old certificate completely changed to conform to the new certificate, such change to be made so as to erase or destroy the old information. I do not see how the intent of the statute can be carried out unless this is done by the register of deeds as it is utterly vain and useless to seal up the old certificate in the State Registrar's office when a copy of the old certificate is always available to the public in the register of deeds' office.

PUBLIC HEALTH; VITAL STATISTICS; DELAYED BIRTH CERTIFICATE;
PROCEDURE FOR AMENDING OR CHANGING CERTIFICATE
BECAUSE OF FALSE INFORMATION

24 July 1947

From your letter it appears that an individual caused the Register of Deeds of a county to forward to you an original and duplicate certificate for the purpose of approval as a delayed birth certificate which was based upon an affidavit before the Register of Deeds that this individual was born on May 7, 1882, and also upon a family Bible record. You approved this certificate and filed the original and returned the duplicate to the Register of Deeds in accordance with Section 130-88 of the General Statutes. It now appears that this same individual made application for ERA assistance and gave her date of birth as May 7, 1887. Later on it appears that this same individual applied for WPA work and gave her date of birth as May 7, 1885. It further appears that the Bible record was a piece of tablet paper pinned to the leaf of the Bible which was published in 1901. The census record of the United States showed that in 1900 she was listed for census purposes at the age of fifteen. On January 22, 1939, she gave the Goldsboro Mutual Burial Association the information that her age was fifty-four.

You would like to know if there is any way to amend this certificate to accord with this subsequent evidence, or if there is any way in which the certificate can be cancelled or revoked.

Apparently Section 130-88 does contemplate that these certificates can be changed as you will note from the second paragraph of the section. However, this change may be that contemplated by Section 130-94 which deals with dated and witnessed amendments, and amendments caused by judgments, orders and decrees of the court.

Section 130-88 gives the State Board of Health the right to promulgate rules and regulations for the administration of this section. I am of the opinion, therefore, that the North Carolina State Board of Health can promulgate rules and regulations whereby, upon notice to such individuals, these delayed birth certificates may be altered or cancelled. Inasmuch as the Register of Deeds makes the initial hearing on these matters, it would probably be better to formulate regulations requiring the Register of Deeds at the instance of the State Registrar, to issue notice to such persons that on a certain day a hearing will be held to determine whether or not such birth certificate shall be altered, amended, or cancelled. If after the hearing, the Register of Deeds certifies to you that the date of birth should be

changed to another date, or that the certificate was apparently obtained upon false information, then you can cancel the birth certificate and require the Register of Deeds to enter a cancellation on his records.

It seems to me that if you pass such regulations that you can make them retroactive as I don't think any individual has a vested right in the registration of a delayed birth certificate. I would advise you, however, to proceed by the regulatory power rather than to take it upon yourself to summarily cancel the certificate upon *ex parte* evidence without notice to the individual concerned. Apparently this certificate was obtained for the purpose of obtaining old age assistance. I would call your attention to the fact that any birth certificate is only *prima facie* evidence of the facts therein contained. It is not conclusive, and if the Superintendent of Welfare, or any other official passing upon any question before him, has such evidence to satisfy his mind that the birth certificate is incorrect, he would not have to act upon the birth certificate, but may find otherwise. In other words, public officials may accept birth certificates as being correct as to the date of birth therein contained, but on proper evidence they can find otherwise, and they do not have to be bound by the date in the birth certificate.

VITAL STATISTICS; LOCAL APPROPRIATIONS THEREFOR; G. S. 130-74

9 September 1947

In your letter of August 28, 1947, you refer to Section 130-101 which requires county and city governments to pay for the registration of birth and death certificates at the rate of fifty cents each. You would like to know if you would be authorized to send a statement to the county and city appropriating bodies, which is as follows:

"Whenever a local health department takes charge of birth and death registration, funds equivalent to the total registration fees at the rate of fifty cents for each birth and death certificate filed in the registration area of the local health department, shall be placed in the budget of the health department *in addition to* the regular appropriation for public health services made by the appropriating agencies.

"It is further understood that fees paid by towns and cities for birth and death registration shall be a part of the funds turned over to the local board of health or health department, unless the county makes sufficient additional appropriation to include the amount that would otherwise be paid by those towns or cities."

Under the provisions of Section 130-74 of the General Statutes, it is specifically provided that where a health officer of a county becomes registrar: "In such case, the fees accruing from the vital statistics registration service, where such service is performed by the county health officer under such appointment, shall be used by the local board of health in its discretion for health service."

You are advised, therefore, that the above quoted statement, in our opinion, is correct; and you would have authority to advise county and city appropriating bodies to such effect. I think it is clear from the statute that the vital statistics appropriation must be made over and above the regular appropriation for health work. If this were not true, you can well

see that there would be no need to mention the matter at all in the statute. The fact that it is specifically mentioned in the statute denotes that it is additional to the regular appropriation made for health services.

PUBLIC HEALTH; SANITARY DISTRICTS; POWER TO ENFORCE REGULATIONS

29 September 1947

Reference is made to your letter in which you refer to a letter from the Bessemer Sanitary District requesting information as to the authority of the Sanitary District Board to adopt and enforce rules and regulations requiring connections to the district water and sewer systems where same are accessible. You also refer to a letter dated August 18, 1944, written by Assistant Attorney General Rhodes, in which he gives the opinion that the governing body of a sanitary district has authority to adopt and enforce rules and regulations within the district.

You would like to know whether or not the violation of such rules and regulations constitutes a misdemeanor, and if the officials of the district are empowered to establish and impose a penalty for an infringement of the district regulations.

You also state another question in which you inquire if the sanitary district board can, after adoption of sanitary rules and regulations, authorize the personnel of the county health department to enforce same in conjunction with the State Sanitary Privy Law.

In attempting to answer these questions, I am doing so on the basis that your references are to general sanitary districts as created and authorized by Article 6 of Chapter 130 of the General Statutes, beginning with Section 130-33 and extending through Section 130-57.1. I have, therefore, not concerned myself with special-tax sanitary districts authorized by Article 7 of Chapter 130 of the General Statutes, beginning with Section 130-58.

A careful search of the law under which general sanitary districts are created, and especially those statutes which fix the power of such sanitary districts, discloses that the General Assembly of North Carolina has not made such a violation of the rules and regulations of a sanitary district a misdemeanor. Since the Legislature has not specifically made such a violation a misdemeanor, it seems to me that this compels me to state that a violation of a regulation of a sanitary district is not subject to criminal prosecution or is not a misdemeanor because for in order for such violation to constitute a crime, the Legislature must definitely so enact. There is no General Statute which, in a general manner, makes the violations of the regulations of a governmental body or agency a misdemeanor. A search of our statutes will show that in any case where such a crime has been established, the General Assembly has definitely so stated and has specifically named the rules and regulations of a particular State agency. In fact, Chapter 130 of the General Statutes, which deals with public health, well illustrates what I mean. I do not think the regulations have the qualities and legal standing that pertain to statutes. If a statute specifically prohibits a thing from being done, which is in the public interest, and then is silent as to whether the violation is a crime or a misdemeanor,

we can resort to the common law to aid us under such circumstances. This is not true, however, as to regulations. What I have said above in regard to misdemeanors applies equally to penalties. I have found no statute which authorizes a sanitary district to impose a penalty, in the nature of a fine of a specific sum of money, for the violation of a regulation of a district. In fact, the regulations that can be promulgated by a sanitary district are limited to the "proper functioning of the works of the district." The only thing that I can see that sanitary districts can do under such circumstances is to cut off or cease to render the services of the district if its regulations are violated. Of course, if property damage results from a violation of regulations, the district can maintain a suit in court to recover damages since a sanitary district has the express right to sue and be sued.

As to your second question, I cannot find any authority that would allow a sanitary district to adopt rules and regulations authorizing the personnel of a county health department to enforce same in conjunction with the Health Department's enforcement of the State Sanitary Privy Law. A district is specifically authorized, subject to the approval of the State Board of Health, to engage in and undertake the prevention and eradication of malaria within the district. A district also has certain enlarged powers with reference to collecting garbage, waste and refuse and furnishing fire protection since, in these instances, the district is vested with the privileges and immunities that are granted to other governmental units in exercising such powers. I cannot find, either by specific authorization or by implication, any authority that would allow the district to tie into the enforcement of the State Sanitary Privy Law as a sort of auxiliary. It seems to me that the Act of 1919 referred to in your letter is a specific grant of authority to the State Board of Health; and while the State Board of Health may authorize sanitary district officials to act as inspectors, I do not see where any authority can be derived by the district itself.

PUBLIC HEALTH; DISTRICT HEALTH DEPARTMENTS; FILING RULES AND REGULATIONS WITH THE SECRETARY OF STATE

31 October 1947

In your letter of October 21, 1947, you refer to Section 143-195 of the General Statutes requiring certain State Agencies to file their administrative regulations or rules of practice with the Secretary of State. You inquire if this section, as well as sections following in the same article, would apply to rules and regulations of a district health department, and especially in the case of a milk ordinance adopted by such health department.

This office has interpreted Section 143-195, and sections following dealing with the same subject matter, as applying only to those State Agencies that exercise State-wide jurisdiction; for example, the Utilities Commission, the Employment Security Agency, the North Carolina State Board of Health, and others. It has never been thought by this office that this statute was intended to apply to rules and regulations of local units of government, and especially those units whose rules and regulations are restricted in their territorial application.

I have consulted with Mr. I. M. Bailey, attorney of Raleigh, North Carolina, who was on the Commission appointed by the Governor to draft certain statutes in regard to the administrative bodies. This bill was drafted by this Commission and was enacted at the General Assembly of 1943. Mr. Bailey tells me that it was never the intention of his Commission that this statute should apply to local units of government; but to the contrary, it was meant to apply only to agencies of the State with State-wide jurisdiction, and this is the opinion of our office in regard to the matter also.

PUBLIC HEALTH; VENEREAL DISEASES; RIGHT OF PEACE OFFICERS TO SERVE
PROCESS ON PATIENTS IN MEDICAL CENTERS

7 November 1947

I reply to your letter to which you attach copy of letter addressed to you from E. C. Phifer, Business Manager of Western Medical Center of Charlotte, North Carolina.

Mr. Phifer states that the question has arisen in the Medical Center as to the right of law enforcement officers to serve process on patients of the Institution. In most instances, he states, officers do permit the matter of service to be continued until the patient has been discharged while other officers take a different position. He would like to know if the officer insists upon serving the papers prior to the time that the patient is released, if he has authority to prevent the officer from making such service. He further inquires if he has the legal authority to refuse them permission to serve papers in a ward at the time the patient is discharged and given his or her clothes.

I do not find any statutes that cover these precise questions so I am compelled to give answers along general principles of law. Frankly, I do not know of any authority or law whatsoever that would prevent a peace officer from serving process on a patient in a Medical Center or for that matter in any other institution of the State. I have been unable to find, and, therefore, I am compelled to say that there does not exist any immunity from service of process because a person is a patient in a State institution, medical center or hospital. It seems to me that peace officers have authority to serve both criminal and civil process on patients in medical centers and hospitals, sanatoria, etc.; and I am sure that civil process is served upon prisoners in the Central Prison of the State. As to criminal process, it is the custom for peace officers to file a notice or paper which is called a detainer with the Warden of the State Prison; and this means that the Warden will notify such officer when the prisoner is about to be discharged and will detain the prisoner for a reasonable time for delivery to such peace officer upon such process. I do not know if prisoners are sent from prisons or jails to the Medical Center where they have been convicted for crimes other than a violation of the Venereal Disease Law. If such is the case, it seems to me that the Medical Center authorities having such prisoners in custody would have a right to allow the peace officer to file a notice that he was wanted at the end of the period of confinement; and then the authorities at the Medical Center could notify such peace officer and deliver to him the prisoner at the end of his sentence

just as is done in the Central Prison. I, likewise, think that if a man is convicted of some offense, whatever it may be, and is sentenced, suspended upon the condition that he attend the Venereal Disease Medical Center that this man has the status of being committed to the care and custody of the Medical Center; and it would seem to me to be reasonable to require the officer to serve the process when the patient is leaving the hospital and to take him into custody at that time. Where, however, the patient is a voluntary patient and has not been convicted of any offense and is not in the Medical Center by virtue of a suspended sentence, it seems to me that the peace officer has a right to arrest him and take him into custody regardless of the fact that he is a patient at the Medical Center.

As to the question of the authority of the administrator of the Medical Center to refuse the peace officer permission to serve the papers in the ward at the time the patient is discharged and given his clothes, I do not think that there is any doubt but what the peace officer, under proper process, can serve the patient at any place he finds him. I am sure, however, that most officers, when requested to do so, will allow the administrator of the Medical Center to bring the patient to the office or some other place where he can be served with process; and if the process requires it, take the patient into custody. It would seem to me that all the officer would care about would be to finally serve his process and obtain custody of the patient. If, however, the officer does insist in seizing the patient anywhere he finds him, and is armed with process, I do not believe that the administrator can lawfully resist him.

VITAL STATISTICS; NAMES OF ILLEGITIMATE CHILDREN; CHANGES OF NAME
REFLECTED ON DELAYED BIRTH CERTIFICATE

12 November 1947

In your letter of October 15, 1947, you state three problems with reference to the names of illegitimate children, relating to birth certificates. The first and third cases set forth in your letter deal with illegitimate children who have been taken into the family of other persons and who have also had the name of the family into which they were received. For example, the child of Nannie Dorsett was taken into the family of Martha Taylor and has always been known as Nathan Ross Taylor. In the third case, the child of Betty Bland was raised by the Perry family and has always been known as John Wesley Perry. In these cases, I think that you can accept a delayed certificate bearing the name by which the child is known even though it is not the name of the mother and father. This would be so in cases of illegitimate children but not in cases of legitimate children because legitimate children, by law, must always bear the family names as their surnames. I think, therefore, that you can accept these delayed certificates with these names.

In your second case, you deal with the illegitimate child of Lucy Gray Tyson. In this case, there has already been filed an original certificate which shows the name as being Fannie Ruth Tyson in accordance with the maiden name of the mother. The facts show, however, that the father of this illegitimate child lived with the family for a long time so that the child actually grew up under the name of Lucy Gray Jones. In this case,

I think that you are authorized, under Section 130-94 of the General Statutes, to make an amendment properly dated, signed and witnessed in order that the name of the child might be changed on the original certificate. It seems to me that you have this power of amendment on old certificates whereas, as you already know, your power to issue a new certificate is limited to specific cases.

PARENT AND CHILD; DIVORCE

20 November 1947

In your letter of the 18th of November, 1947, you inquire if in a case where a married couple have been divorced and within nine months after the divorce becomes final a child is born to the woman, is such child legitimate or illegitimate.

G. S. 50-11 provides in part that "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children *in esse*, or begotten of the body of the wife during coverture; . . ."

It is the opinion of this office that such a child is legitimate because, from the facts of the case as stated by you, this child, having been born within nine months of the divorce proceedings, would be presumed to be begotten during coverture.

PUBLIC HEALTH; MUNICIPAL CORPORATIONS; INSPECTION OF WATERSHEDS; POWERS OF INSPECTORS WHERE WATERSHED LIES IN TWO COUNTIES

4 December 1947

It appears from your letter of November 20, 1947 that the City of Concord employs a watershed inspector under the authority of Sections 130-113, 130-114 and 130-115 of the General Statutes. The watershed of the Town of Concord lies within two counties, Cabarrus and Rowan. The Concord inspector has been deputized in Cabarrus County, and I assume by this that you mean he has been deputized as a deputy sheriff; but you are informed that he cannot be deputized in two counties and, therefore, would not have any authority in Rowan County by virtue of being deputized.

You inquire as to the authority of this watershed inspector of the Town of Concord to enter on property and into premises and to indict, if necessary, violators of sanitary regulations in Rowan County.

Municipal corporations are allowed to establish watersheds, and this they may do by purchase or condemnation. It is also required by Section 130-113 of the General Statutes that certain inspections be made of these watersheds under certain conditions; and municipal corporations are authorized to make such additional inspections as they think necessary. Section 130-114 is as follows:

"Each sanitary inspector is authorized and empowered to enter upon any premises and into any building upon his respective watershed for the purpose of making the inspection required."

Under the provisions of Section 130-115, persons who are residents on watersheds must carry out reasonable instructions furnished them by the municipal health officer of the State Board of Health. If the instructions are furnished and the resident on a watershed refuses to carry out these instructions, it is possible for such a person to be convicted of a misdemeanor. Under the provisions of Section 130-116, it is made a misdemeanor to defile or make impure certain sources of water supply of the public allowing certain substances to be deposited or remain on the watershed of these municipalities.

It seems to us, and we are of the opinion, that an inspector, provided he acts within the confines and limits of a municipal watershed, has a right to carry out his duties regardless of the fact that the watershed may be located in two counties or other geographical divisions or limits of local governmental units. The jurisdiction and powers of a sanitary inspector appoined to look after watersheds is related and extends over the watershed of a municipality wherever it may be located in this State; therefore, we are of the opinion that an inspector may enter upon premises and into any building upon his respective watershed for the purpose of making the necessary inspections, and the fact that the watershed lies in two counties does not affect his authority. Of course, if he decides to prosecute somebody who lives in that portion of the watershed lying in Rowan County, he will have to institute his prosecution in Rowan County. The place of trial of crimes in this State is local. It is confined to the counties where-in offenses may be committed. I see nothing in the statute that would give this inspector the power to arrest people in Rowan County although he may have this power in Cabarrus County by virtue of being a deputy sheriff. Therefore, under the facts stated in your letter, although he can make inspections and enter the premises in Rowan County on that part of the watershed belonging to Concord and within its limits and boundaries, he cannot arrest people in Rowan County; and I do not think he could be made a deputy sheriff in Rowan for the reason that he is not a resident citizen of that county.

VITAL STATISTICS; AUTHORITY OF COUNTY TO PAY A PORTION OF
REGISTRATION EXPENSES FOR CITY

12 December 1947

You call our attention to Section 130-101 of the General Statutes relating to the duty of counties and cities to pay local registrars for birth and death certificates made out, registered and recorded. You state that in certain cities where there are hospitals, a certain amount of money has to be paid by the cities as registration fees for births and deaths of non-residents.

You would like to know if it would be permissible in such cases for the county to pay a part of the registration expenses of the city. You state that the money would be paid directly to the local registrar for the city and would be calculated by determining the number of nonresident certificates filed with the registrar in question.

I have examined all statutes that I think pertinent to this question, and I cannot find any authority which would allow a county to make such payments. Counties and cities must expend their funds for public purposes

and within the statutory authorizations as set up in their budgets. Certainly Section 130-101 does not authorize any such payment since it is the purpose of this section to require counties to pay for registrations outside of incorporated municipalities and to require cities and towns to pay for registration work within the incorporated cities and towns. I cannot find any authority in this or any other statute which allows these governmental units to supplement or aid each other in discharging the financial obligations of this work. If this is a desirable objective, you should seek enabling legislation on this point.

PUBLIC HEALTH; VITAL STATISTICS; CHILD BORN OF BIGAMOUS MARRIAGE;
DECREE CHANGING NAME OF CHILD TO THAT OF MOTHER;
CHANGE OF BIRTH CERTIFICATES

22 December 1947

It appears that a marriage ceremony was performed between Lois Jenkins and one Horace E. Brendle who was then using the name of Don Paul Layne, Jr. Brendle was found guilty of bigamy, and the marriage was annulled. Subsequently it appears that Lois Jenkins, acting as next friend of the child, instituted a proceeding and had the name of the child changed from Lois Anne Layne to Lois Ann Jenkins. You state that you are in doubt as to the correction of the child's birth certificate. You ask if you should change the item pertaining to the marital status of the mother to "No." You state that this would create the condition of making the child illegitimate. You state that if you consider that the parents were married at the time of the child's birth, even though the marriage was later annulled, still the Court order gives the child the mother's name, thus resulting in a conflict on the certificate and causing the certificate to show that the child had a legal father but did not bear his name.

In this State, bigamous marriages are void. See Section 51-3 of the General Statutes. Such marriages are void from the very beginning, or, as the Courts say, *ab initio*. It is not necessary to have such marriages annulled by a Court decree; but on the contrary, either party can treat such a marriage as void, and such a marriage imposes no legal restraint upon the injured party from contracting another marriage. See *TAYLOR v. WHITE*, 160 N. C. 38. There is no statute in this State which declares children born of a bigamous union to be legitimate. On the other hand, I think I am compelled to state that under our law, children born of a bigamous marriage are illegitimate. As a result of these decrees, therefore, I see nothing else for you to do except to amend these certificates so they will speak the truth all the way through. The marital status of the mother should be shown, therefore, as not married; and the child's name should be shown as Lois Anne Jenkins, in view of the order changing her name, a copy of which is attached to your letter.

PUBLIC HEALTH; SANITARY DISTRICTS; AUTHORITY TO PROVIDE FOR THE
COLLECTION AND DISPOSAL OF GARBAGE

9 January 1948

You inquire of this office if sanitary districts created under Article Six of Chapter 130 of the General Statutes have the authority to provide for the collection and disposal of garbage within the district.

You call attention to the fact that the last paragraph of Section 130-39 restricts the application of subsections 12, 13, 14, 15 and 16 to sanitary districts adjoining cities having a population of 50,000 or more. However, Chapter 476 of the Session Laws of 1947 struck out and repealed the last paragraph of Section 130-39.

Since the repeal of this last paragraph mentioned above, I am of the opinion that sanitary districts, both under the general provision of the statute and by specific provisions, have the clear and express right and authority to provide for the collection and disposal of garbage and other refuse within the district.

PUBLIC HEALTH; PRISONS AND PRISONERS; JURISDICTION OF HYGIENICS
AND SANITATION; STATE BOARD OF HEALTH AND STATE
BOARD OF PUBLIC WELFARE

8 March 1948

In your letter of February 27, 1948, you ask what the present authority of the State Board of Health is in regard to city and county jails or prison camps. You state that it is your understanding that G. S. 148-10 repeals G. S. 130-6. You further state that it is your understanding that such jails and prison camps are in the exclusive jurisdiction of the State Board of Public Welfare.

It is my opinion that the State Board of Health still has the supervision of city and county jails in regard to the method of construction and sanitary or hygienic care as provided in G. S. 130-6.

It is to be noted that in Chapter 163 of the Public Laws of 1925, C. S. 7713, which is the same as G. S. 130-6, and C. S. 7714, which is virtually the same as G. S. 148-10, were passed during the same session of the Legislature. Consequently, it is clear that 148-10, though there have been some minor changes, would not repeal 130-6.

You refer to Chapter 915 of the 1947 Session Laws, which amends G. S. 153-49. This amendment authorizes the State Board of Public Welfare to inspect jails and disclose inadequate care or mistreatment of prisoners in violation of Chapter 153. It therefore appears that there is some overlapping of the jurisdiction of the State Board of Public Welfare and that of the State Board of Health. It is my opinion, however, that the State Board of Health does have such authority as it previously had.

PUBLIC HEALTH; VENEREAL DISEASE; AUTHORITY TO TREAT SYMPTOMATIC
NEURO-SYPHILIS AT RAPID TREATMENT CENTER; RELEASE OF LIABILITY
OF INDIVIDUAL PHYSICIAN OR EMPLOYEE; COMMITMENT OF
ACUTELY INSANE OR DANGEROUSLY INSANE PEOPLE

10 March 1948

You state that there are in this State patients who may or may not have been treated for symptomatic infection who have developed early manifestations of Neuro-syphilis, these manifestations belonging in the category of the early tabetic and early parietic. If these persons remain untreated, they may become totally disabled as a result of this symptomatic infection since they can develop into a true tabetic and a marked parietic.

The tabetic case affects largely the ability to walk. The parietic case is what is known as the syphilitic insane. It is estimated that some eight or ten per cent of the patients in mental disease hospitals are there as a result of one of these manifestations. You further state that the mental disease hospitals do not have beds available or the staff to handle the early symptomatic cases. It is also difficult, in some cases, to secure the commitment of these patients because of objections on the part of the patient or relatives, that is, cases with early manifestations. It has been suggested that the Venereal Disease Division of the Public Health Program consider the advisability of establishing facilities in one of the Rapid Treatment Centers for the treatment of this type of venereal disease after it has reached the symptomatic stage. You raise certain legal questions with reference to (a) the authority of the State Board of Health to treat these cases in the venereal disease Rapid Treatment Center; (b) the question of the State's liability in cases of personal injury to the patients or accidents at the Rapid Treatment Center; (c) the question of personal injuries or damages where an insane patient is admitted or one deemed to be insane when admitted; and (d) the problem of committing a patient to a State Hospital for the insane should the treatment procedure result in a case of acute insanity or the patient should become dangerously insane.

I will attempt to answer your questions in order as follows:

(1) As suggested by you, it seems to me that you have ample authority to treat these patients on a voluntary basis and, if necessary, to resort to legal procedure to compel such treatment. This authority is granted under Article 19 of Chapter 130 of the General Statutes, and especially under Sections 130-206, 130-209 and 130-212. While some of the sections in Article 19 of the General Statutes deal with venereal disease in a communicable or infectious stage, nevertheless, Section 130-206 does not make any distinction between degrees or stages of the disease; and it would seem, therefore, that Neuro-syphilis would come within the term "venereal disease." It is just as necessary, it seems to me, to treat and rehabilitate, if possible, persons suffering from venereal disease of this stage or type as it is to prevent or treat syphilis in more active or infectious stages. I think that these statutes express the policy of eradication as far as possible of all types and all stages of venereal diseases.

(2) As to the question of some possible personal injury or accident to patients which might occur during the therapy or treatment at the Rapid Treatment Center, I think that there would be very little difference in liability, if there is any liability, between patients admitted on a voluntary basis and on a compulsory basis. I am sure that the State of North Carolina would not be liable in any suit for damages and that no suit against the State of North Carolina or the North Carolina State Board of Health could be successfully maintained. A sovereign does not allow itself to be sued in such cases. There is a possibility that in some rare instances, a suit could be maintained against some individual doctor or employee. It does not necessarily follow that because a State or an agency of a state is immuned from suit that the employees of a state are also immuned where suits are brought against them personally. I would, therefore, suggest that all persons admitted be required to sign some release or waiver of liability,

which release or waiver would include a release or waiver of liability as to any employees employed in the administration of the therapy or treatment. In most cases, I think you can rely on your judgment as to the mental condition of the patient when admitted and can decide if he has sufficient mentality to execute such a release. If the patient is a minor, such release should be signed by his parents as well as the minor or by any guardian that he may have. If it is thought that the mental condition of the patient on admission is of a doubtful nature, then I do not think any release that he would sign would be binding unless the same was signed by his guardian; and, of course, such person may not have a guardian. I think that I would consider whether I would admit this type of patient at all or not.

(3) You state that it is possible that under the treatment procedure which may be used, that a patient may become more acutely insane and that this would require additional custodial care other than that which might be provided in a facility designated purely for treatment. I think that in such cases, you could work the matter out under Section 132-57 of the General Statutes which provides in substance that whenever any citizen or resident of the State becomes suddenly or violently mentally disordered, he may be committed to the proper State Hospital, private hospital or county hospital until adjudication can be made for a period of not exceeding ten days. This commitment can be made upon the affidavit of one physician, not related by blood to the mentally disordered person and licensed to practice medicine in North Carolina or the commitment can be made by order of the clerk of the Superior Court of the county in which the patient becomes suddenly or violently mentally disordered. The adjudication of a person temporarily committed can then proceed with the removing of the person to the county of his residence. It seems to me that the statute contemplates that the final adjudication shall be made by the clerk of the Superior Court of the county of the legal residence of the person or the county of his legal settlement. I am of the opinion, therefore, that you can work out this proposition by having such persons committed by the clerk of the Superior Court: for example, by the Clerk of the Superior Court of Durham County for the temporary commitment and then proceed to final adjudication in the county of residence or legal settlement of such person. It seems to me that you should, as suggested in your letter, work the problem out also with the proper authority of the various State Hospitals to which hospitals you would expect these persons to be committed. This would result in a speedy commitment, and you would know that the hospital would commit the person.

COUNTIES; LIABILITY FOR NEGLIGENCE; OPERATION OF
FEDERAL OWNED TRUCKS

23 March 1948

I received your letter of March 20 with reference to the liability of counties which may use motor vehicles provided by the United States Public Health Service through the State Board of Health in the DDT Residual Spraying Program for malaria control.

I note from your letter that the United States Public Health Service requires that the county sign the form, a copy of which you enclose in your letter, by which it assumes full liability for and agrees to absolve

the North Carolina State Board of Health from any and all property damage and personal injury claims that may arise from the operation of Federally-owned vehicles.

As a general principle of law, the counties and the county boards of health, in cooperating in the program, would be exercising a governmental function and there would be no public liability on account of injuries received by negligence of its employees while operating a motor vehicle connected with this work. The United States Public Health Service and the State Board of Health would not be in any sense legally liable for injuries received by the operators or by the public from motor vehicles which had been turned over to the counties for this purpose.

The paper which they propose to be signed by the county health authorities might, however, impose a liability on the county by contract which did not otherwise exist. This form provides that the county agrees to assume full liability for any and all property damage and personal injury claims that may arise from the operation of Federally-owned vehicles assigned to it. I believe it would be much better to have the form read substantially as follows:

"The _____ hereby agrees to indemnify and save harmless the North Carolina State Board of Health and the U. S. Public Health Service from any and all property damage and personal injury claims that may arise from the operation of Federally-owned vehicles assigned to _____ and operated by non-Federal employees."

I believe if you could get the paper submitted in this form, it would protect the State and the Federal Government and would not create a new liability for the county. I believe it would be much better than to have it in the present form.

PUBLIC HEALTH LAWS; SEWERAGE CONNECTIONS; MUNICIPALITIES

9 April 1948

In your letter of the 7th of April, 1948, you state that in Fayetteville, North Carolina, there is a building which contains four apartments and that in this building there is only one commode or one toilet for all four apartments. You inquire, since these are separate living units, if, under G. S. 130-148, the word "residence" would be construed as applying to each of the four separate apartment units and would be required to be furnished with separate toilet facilities.

G. S. 130-148 is in part as follows:

"No person shall maintain or use a residence, located within three hundred yards of another residence, that is not provided with sewerage, or with septic tanks approved by the state board of health, . . ."

The Supreme Court of this State, in a number of cases, has construed an apartment house to be a residence. See *CONSTRUCTION COMPANY v. COBB*, 195 N. C. 690; *DeLANEY v. VanNESS*, 193 N. C. 721.

In view of these decisions and in view of the fact that the apartment house to which you refer has a sewerage connection, it is the opinion of this office that G. S. 130-48 has no application thereto.

It is suggested that perhaps under the authority of the general powers granted to municipalities with respect to public health under G. S. 160-200, the City of Fayetteville could, by enacting a proper ordinance, require separate toilet facilities for each of the living units located in this apartment house.

MOTOR VEHICLE INSPECTION ACT; APPLICATION TO
GOVERNMENT-OWNED VEHICLES

20 April 1948

You state that you have a number of trucks and cars owned by the United States Government which at present are being used in the typhus and malaria control programs in the State. These programs are carried on jointly by the U. S. Public Health Service, the State Board of Health and local communities.

The answer is that such vehicles do not have to be inspected as they are not subject to the State Act regulating the inspection of motor vehicles. This Act applies to those vehicles registered in the State, and government-owned vehicles are not required to be registered.

PUBLIC HEALTH; VITAL STATISTICS; BIRTH CERTIFICATE; NAME OF FATHER;
CHILD BORN WHILE SEPARATION AGREEMENT IN EFFECT

3 June 1948

Your letter concerns the legitimacy status of a child born to Mrs. Homer L. Cotton. It appears that when the birth of the child was reported to the Bureau of Vital Statistics, Homer L. Cotton, Jr., was reported as the father; and his name as the father of the child is now on the birth certificate in your Bureau. You further enclose me a copy of a separation agreement between Homer L. Cotton, Jr., and his wife, Geneva Cotton, which was executed by both parties on the 9th day of February, 1946; and the same shows to have been acknowledged before the Clerk of the Superior Court of Stanly County on the same date. The birth certificate shows that the child was born on the 1st day of March, 1947. A letter from Mr. Burleson, of the firm of Burleson & Hopkins, of Albemarle, North Carolina, states that Homer Cotton and his wife separated on January 10, 1946, and signed the deed of separation on February 9, 1946. The attorney requests that you erase the name of the father from the birth certificate.

You inquire as to the status of this child as to its legitimacy and if sufficient grounds exist to remove the name of the father from the birth certificate.

It is the universal rule in this and in nearly all other states that when a child is born in wedlock, it is presumed to be legitimate. The Supreme Court of North Carolina, in the case of *EWELL v. EWELL*, 163 N. C. 233, said: "Nothing is allowed to impune the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been his father."

I think, therefore, that under the rules of law existing in this State, this child is presumed to be legitimate because it was born when the status of marriage still existed between the husband and wife. I, therefore, do not see how you can alter this birth certificate until the child is shown to be illegitimate in a Court of competent jurisdiction and a certified copy of the decree of such action is furnished your office. Of course, we know nothing as to the actual facts as to the parentage of the child; but we are compelled to rely on the presumptions of law until the contrary is shown in a legal manner.

PUBLIC HEALTH; STATE GRANTS OF FUNDS TO LOCAL HEALTH DEPARTMENTS;
TERMS AND CONDITIONS OF CONTRACT ENTERED INTO BETWEEN STATE
BOARD OF HEALTH AND LOCAL HEALTH DEPARTMENTS

18 June 1948

I have your letter with which you send me copy of contract used by the State Board of Health in granting funds to local health departments for public health work and as authorized by the health laws of this State. You send me a copy of the contract that was in force in 1947; and you also send me a copy of a proposed contract which will be put into effect for the fiscal year beginning July 1, 1948, and which will govern your contractual rights and duties as well as those of district health departments.

It is noted that there are some slight changes in the 1948 contract which you propose to use. In my opinion, the terms and conditions of the proposed 1948 contract to be used beginning July 1, 1948, are duly authorized by the statute; and so far as I can see from my examination, the proposed contract is lawful in every respect. This contract is authorized by Section 130-66 of the General Statutes, and this same paragraph is carried forward in Section 130-66 of the General Statutes as the same was rewritten in 1945 and passed by the General Assembly. The North Carolina State Board of Health is authorized to grant funds to the local health departments and, in my opinion, is authorized to make reasonable terms and conditions which shall be met and complied with by the local units in consideration of the grants of funds being made.

I note, and especially approve, your revision of Section 2 of the proposed 1948 contract, which is as follows:

"That the county, city, or district health officer as agent of the local board of health shall have sole authority to employ, direct, and replace all other members of the staff of the county, city, or district health department, such appointments to be made in conformity with the Merit System Principle as outlined in Chapter 378, Public Laws of North Carolina, 1941, and the rules and regulations adopted by the Merit System Council as authorized; those appointments to be made from the qualified list certified by the Supervisor (copy of rules and regulations to be obtained from the Supervisor of the Merit System). The signature of a member of the local Board of Health, selected by said Board, is required on all Merit System forms relating to employment or change of salary or classification of health department personnel to signify that the Board is apprised of and approves the rates of pay involved. In city departments the forms may be signed by the city manager or mayor."

This revision brings the local health units into line with the requirements of the Merit System Law, rules and regulations. Under the Merit System Law and its authorized rules, an appointing authority, among other definitions, includes the county board of health, duly constituted as provided by North Carolina laws creating the State Board of Health and county boards of health and the county or city boards of health and for subordinate personnel, the executive officer of county, city or district boards of health. Irrespective of anything contained in this rule, local health departments are entitled to know what persons are employed and how funds are allocated for salaries and distributed in order to prevent undue discriminations and favoritism being shown to individual members of county personnel. I, therefore, approve your revision which requires the signature of a member of the local board of health, selected by the Board, on all Merit System forms relating to employment, change of salary or classification of health department personnel. This signature of an authorized member of the board is for the purpose of showing that the board has knowledge of and approves the salary scales and rates of pay involved. I also think that you have a right to require, as a condition of these grants, that the county, city or district health officer should have authority to employ, direct and replace members of the staff of the county, city or district health departments, such duties and rights to be exercised in accordance with the Merit System Law and with full right of any employee to appeal to the Merit System Council upon dismissal, where such right of appeal is granted.

OPINIONS TO STATE BOARD OF EDUCATION

STATE SELF-INSURANCE ACT; STATE BOARD OF EDUCATION; RIGHT TO ACT AS SELF-INSURER; STATE SCHOOL BUSES

2 July 1946

I acknowledge receipt of your letter, in which you inquire as to whether or not the State Board of Education may take advantage of the 1945 Act of the Legislature, establishing a State Property Fire Insurance Fund, in lieu of purchasing fire insurance coverage on its school buses.

Chapter 1027 of the Session Laws of 1945 created the "State Property Fire Insurance Fund" which provides, in part, "that upon the expiration of all existing policies of fire insurance upon State-owned buildings, fixtures, furniture, and equipment therein, including all such property the title to which may be in any State department, institution or agency, the State of North Carolina shall not re-insure any such property."

It is my opinion that the property covered by the State Property Fire Insurance Fund is limited to State-owned buildings and the furniture, fixtures and equipment located within such buildings and that it does not include such personal property as school buses, and the State Board of Education should either provide the necessary fire insurance coverage or take advantage of Section 115-377 of the General Statutes which authorizes the State Board of Education, in its discretion, to purchase fire insurance coverage on its school buses or to act as a self-insurer.

SCHOOLS; PUPILS MAY BE REQUIRED TO ATTEND SCHOOL IN DISTRICT IN WHICH THEY RESIDE

9 July 1946

I acknowledge receipt of your letter enclosing a letter from Superintendent M. P. Jenkins of the Pasquotank County Schools, in which he complains about children being transported from the school district in which they reside to another district, and requesting your Board to take action to prevent the operation of the private or community bus in transporting children to a school other than the one in their resident district.

In our discussion over the 'phone we concluded that a child could use any means of transportation to school it desires, or may walk, but that the situation confronting Superintendent Jenkins is not so much the question of the mode of conveyance to the school but is a question as to whether or not the State or County Board of Education may require pupils to attend the school located in the school district in which they reside, and you request my opinion as to the authority of the State and County Boards in this respect.

I have not been able to find any direct authority for the State or County Board of Education to require children to attend any particular school, but there is certainly nothing in the statute which denies such authority, and all of the inferences of the statutes indicate that the school authorities do have such power.

Section 115-9, in defining the term "district," among other things, says:

"There shall be two kinds of districts: (1) the non-local tax district, that is, *one attendance area* of the county administrative unit under the control of the county board of education . . ." (Italics added).

This indicates to me that pupils may be required to attend school in the district in which they reside.

Section 115-352, Paragraph 2, gives to the State Board of Education the authority to transfer pupils from one district to another when it appears to be more economical for the efficient operation of the schools. Certainly, if the Legislature felt that it was necessary to give to the State Board of Education the authority to transfer pupils from one district to another, children could not voluntarily transfer themselves from one school district to another. And again, in Section 115-376, school buses are required to be routed so as to go within one mile of all children who live more than one and one-half miles from the school to which they are assigned. Certainly, it can be argued that this section recognizes the authority of the State Board to assign pupils to a particular school.

Section 115-303 authorizes the State Board of Education, as an aid to enforcing compulsory attendance in schools, to formulate such rules and regulations as may be necessary for the proper enforcement of the attendance laws and prescribes what shall constitute truancy and what causes may constitute legal excuses for temporary non-attendance or under what circumstances principals and superintendents may excuse pupils for non-attendance, and the section requires all school officials to carry out such instructions from the State Board of Education, and upon any such official failing to carry out such instructions, he would be guilty of a misdemeanor.

And Section 115-31.2 (Supp.), in defining the powers and duties of the State Board of Education, authorizes it to divide the State into a convenient number of school districts, to apportion and equalize the public school funds over the State, and in general to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.

It seems to me that under this authority the State Board of Education might adopt a rule or regulation requiring the County Board of Education and/or the district school committee or the superintendent or principal of a school to require the pupils residing in a district to attend the school located in the district in which they reside, and of course, if such Board or other school officials violate the provisions of the regulation, they may be prosecuted under the provisions of the Act. It seems to me that it would be impossible for the State Board of Education to apportion and equalize the public school funds of the State if it did not have inherent power to divide the county into school districts and to require pupils residing in such district to attend the school therein designated by the school authorities for such attendance. The State Board would be unable to determine the number of teachers or other necessary facilities for a school district unless it could know in advance approximately the number of pupils who would attend the particular school, and this knowledge could not be ascertained unless the State Board had the authority to require pupils to attend a particular school.

I am, therefore, of the opinion that the State Board of Education, in co-operation with and through the local school authorities, has the power to require public school pupils to attend the school located in the district in which such pupils reside and to which they have been properly assigned by the school authorities.

SCHOOLS; USE OF SCHOOL PROPERTY; CONTROL; RECREATION; RESPONSIBILITY
OF TEACHERS ON PLAYGROUNDS

6 August 1946

I acknowledge receipt of your letter enclosing a letter from Superintendent R. W. Carver of the Hickory City Schools.

I understand that a Recreation Commission, not created or organized pursuant to the 1945 Act, desires to sponsor a program of recreation in his city schools, and have requested that the school buildings, grounds, cafeteria, auditorium, and probably other school property be made available for the use of the Commission. Of course, I presume that they do not propose to make such use of the property as would disrupt the regular school day.

You inquire as to the authority of the Board of Trustees or the State Board of Education to permit such use of the school property, and, raised the question as to the responsibility of principals and teachers for the conduct of pupils on the grounds after close of regular school classes and as to the responsibility for janitor service, lights, water, power, etc., while the property is being used by the Commission.

As to the custody, control, and use of school property, I call your attention to Section 171-36 of the Public Laws of 1923 (General Statutes 54-78) which provides:

"It shall be the duty of the County Board of Education and Board of Trustees to encourage the use of the school buildings for civic or community meetings of all kinds that may be beneficial to the patrons of the community, and the County Board of Education or Board of Trustees has authority to make rules and regulations governing the use of school property."

"This section was modified by the School Machinery Act of 1939, and now appears in the North Carolina General Statutes, Section 115-95, in the following language, 'It shall be the duty of the County Board of Education as to county administrative units and the Boards of Trustees as to city administrative units, to encourage the use of school buildings for civic or community meetings of all kinds that may be beneficial to the members of the community, the State School Commission and the County Boards of Education for county administrative units and Boards of Trustees for city administrative units, shall have power and authority to promulgate rules by which school buildings may be used for other than school purposes.'"

The policy of the State has been to encourage the use of school buildings for various civic and community meetings, but it is apparent from the quoted sections that the State Board of Education, which has superseded the State School Commission together with the trustees of a city administrative unit, has the control and custody of school buildings and property, and may promulgate rules and regulations permitting such use of school property as to them seems wise for other than school purposes.

I think that the authority and responsibility of teachers over children participating in the proposed recreational program could likewise be covered by regulations adopted by the city school trustees and the State Board of Education.

I refer you to 56 C. J. 854 which states:

"Although a school teacher or a school board ordinarily has no right of control over a child after he has returned to his home or his parents' control and cannot punish him for ordinary acts of misbehavior thereafter, the supervision and control of a teacher over a pupil, and of a school board, to make needful rules for the conduct of the pupils, is not confined to the schoolroom and school premises, but extends over the pupil from the time he leaves home to go to school until he returns home from school, and where the effect of acts done out of a schoolroom while the pupils are coming to or going from school reach within the schoolroom, and are detrimental to good order and the best interests of the school, such acts may be forbidden and the teacher may punish an offending pupil when he comes to school, but the connection between the prohibited acts and the discipline and welfare of the school must be direct and immediate, not remote or indirect."

On May 6 in a letter addressed to Superintendent B. N. Barnes of the Kings Mountain City Schools this office expressed the opinion that the State, county, or city administrative school boards are not liable for injuries sustained by school children on the school playground or in the gymnasium during health and physical education periods. See *PRUDENTIAL INSURANCE COMPANY v. POWELL*, 217 N. C. 498, *CHEMICAL COMPANY v. BOARD OF EDUCATION*, 111 N. C. 135, and *GRANVILLE COUNTY BOARD OF EDUCATION v. STATE BOARD OF EDUCATION*, 106 N. C. 81.

In short, it seems to me that all of the questions raised by Superintendent Carver are subject to rules and regulations which have been, or may be, adopted by the City Board of Trustees and approved by the State Board of Education, and that, therefore, his problem is one of administration. But I concur with Mr. Carver and you who discussed this matter with me that there is danger of the proposed program seriously interfering with the proper operation of the schools.

EDUCATION; PUBLIC SCHOOLS; TEACHERS; NOTICE OF RESIGNATION TO BE GIVEN BY TEACHER; COMPUTATION OF TIME OF NOTICE

26 August 1946

You attach to your letter of August 21, 1946, a letter received by you signed by Mr. R. B. Griffin, Superintendent of Person County Schools. Mr. Griffin states that on July 25, 1946, Mr. Thomas M. Dennis was wired that he had been elected to teach and coach in the Bethel Hill School of Person County. On July 26 Mr. Dennis wired his acceptance of the position. A formal contract was prepared and mailed to Mr. Dennis a few days later. It further appears that on the 31st of July, Mr. Dennis signed a formal contract sent him by a school in Martin County. The Martin County contract was signed by Mr. Dennis before the arrival of the formal contract from Person County. On July 29, 1946, Mr. Dennis wrote a letter to the school authorities of Person County which letter was

received by the school authorities of Person County and in the office of the Person County Board of Education on the first day of August. The substance of this letter was that Mr. Dennis had already signed a contract with Martin County or was about to sign it, and he asked the Person County school authorities to get another man for the place. It should be noted that the schools in Person and Martin Counties begin on August 28th and 29th.

You state that you would like to know whether or not under these circumstances Mr. Dennis gave proper notice according to the school law for the termination of his contract with the Person County Schools which he accepted by wire. You further state that it seems to you that any decision in this matter would hinge on whether or not Mr. Dennis' letter of July 29th is legal from date of writing or from date of its reception in Roxboro.

The notice that a teacher must give in order to terminate a contract is set forth in Section 115-359 of the General Statutes and is as follows:

"Provided, further, that principals and teachers desiring to resign must give not less than thirty days' notice prior to opening of school in which the teacher or principal is employed to the official head of the administrative unit in writing. Any principal or teacher violating this provision may be denied the right to further service in the public schools of the State for a period of one year unless the county board of education or the board of trustees of the administrative unit where this provision was violated waives this penalty by appropriate resolutions."

You will note from the statute that the teacher must give "not less than thirty days' notice prior to the opening of school" and that the method or manner of giving notice, that is as to how the notice shall be delivered, is not set forth in the statute. The notice must be in writing, but it is not required that the notice shall be formally served; and it is not said that the notice shall be sent by mail.

As to service of a notice by mail in the absence of any custom, statute, or express contract, the author in 46 C. J., Section 69, p. 559, says in part as follows:

"In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until the notice comes into the hands of the one to be served, and he acquires knowledge of its contents, except perhaps in those cases where the party to be notified resorts to some trick or artifice to avoid knowledge of its contents. However, by force of statute or by provision of contract, service may be effective when the notice is properly mailed, regardless of its receipt by the addressee. Where a paper served by mail actually came to the hands of the person to be served in due time, the service has been held to be good, although the mailing was after the time prescribed by the law. The rights of a party were held not concluded by a notice mailed but not received by him, where no injury is shown to have resulted from such holding."

I am of the opinion, therefore, that the time of Mr. Dennis' notice by letter would date from the date of its reception in the office of the Person County Board of Education on the first day of August; and, therefore, Mr. Dennis has not given the actual thirty days' notice for the termination of his contract with the Person County School authorities.

SCHOOLS; LUNCH ROOMS; COMPENSATION INSURANCE ON EMPLOYEES

15 October 1946

I acknowledge receipt of your letter in which you inquire as to whose duty it is to provide Workmen's Compensation insurance on employees of school cafeterias and lunch rooms.

There is no duty upon the State to provide Workmen's Compensation coverage on employees of school cafeterias or lunch rooms, unless such employees are otherwise regularly employed in the schools and are being paid entirely from State funds. Of course, such employees are already covered by virtue of their other employment in the public schools. Section 115-381 specifically prohibits the use of State funds for the operation of school cafeterias or eating places.

If the employee of the lunch room is otherwise employed in the schools, and his or her salary paid from local funds, I can see no occasion for obtaining additional Workmen's Compensation coverage as such employee would be covered by virtue of his or her employment in the schools as a county employee.

If the employee of the school cafeteria or lunch room is not otherwise employed in the public schools, and, therefore, not covered by Workmen's Compensation insurance, I am of the opinion that such employee should be covered by Workmen's Compensation insurance provided for by the county, if the cafeteria or lunch room is operated by the county. I have given careful study to the agreements required by the State Board of Education of county and city administrative units in order to participate in Federal funds, provided for the operation of school cafeterias and lunch rooms, and I am of the opinion that employees of lunch rooms which are provided for from such Federal funds distributed through the State Board of Education, pursuant to contract, should be covered by Workmen's Compensation insurance and the premium paid for by the county or out of the operation expenses of such cafeteria or lunch room.

Of course, if the cafeteria or lunch room is not operated as a county or city administrative unit function, but on a concession basis, there would be no liability on the part of the county to provide such insurance, as those employed would not be county employees but employees of those operating the cafeterias or lunch rooms, and coverage should be provided by such operators.

SCHOOLS; SALE OF SCHOOL PROPERTY; DISPOSITION OF PROCEEDS OF SALE

16 December 1946

I have your letter of December 13, in which you enclose a letter from Mr. John A. Holmes, Superintendent, Edenton City Schools, under date of December 10. Mr. Holmes in this letter makes an inquiry as to whether or not the Board of Trustees of the Edenton City Administrative Unit has any property rights in those schools which were placed under their jurisdiction when the Edenton City Administrative Unit was expanded beyond the boundaries of the Edenton Special Charter School District at the time the City Administrative Unit was created. He states that they plan to enlarge the site of one of the school buildings so acquired and would like to dispose of an abandoned site and use the money for this purpose.

The responsibility now for providing for capital outlay for the acquisition of school sites and buildings in city administrative units rests with the Board of County Commissioners as the tax levying authority, for which county-wide taxes are levied. The sale of any school property which is unnecessary for school use which was acquired originally by the County Board of Education would have to be made by the County Board of Education and the proceeds of the sale paid into the county school fund, to be expended under approved budgets.

Since it is the duty of the Board of County Commissioners to provide for capital outlay for city administrative units, the City Administrative Unit would have a right to include the desired purchase in its budget for approval by the Board of County Commissioners and the proceeds of the sale of any school property purchased by the County Board of Education would go into the county school fund for expenditure under authorized budgets.

I have heretofore had occasion to render opinions on this subject in several instances which have arisen. I believe this is the correct conclusion.

SCHOOLS; TEACHERS; PAYMENT OF SALARY FOR TEACHERS FOR LESS THAN FULL MONTH

10 March 1947

I acknowledge receipt of your letter enclosing a letter which you received from Superintendent N. F. Steppe of McDowell County, in which he questions the authority of a teacher to receive pay for time taught for less than one month, unless the teacher is providentially hindered from completing the term.

I do not recall that this office rendered a formal opinion on the facts in this case. As I recall the matter which you discussed over the telephone with me, I suggest that it might be best to pay the teacher for the time actually taught, but there certainly is no requirement to do so. I am fully familiar with Section 115-79 of the General Statutes which states that the Board of Education shall not authorize the payment of the salary of any teacher for a shorter term than one month, unless providentially hindered from completion of the term.

It seems to me that it is a question for the County Board of Education to determine whether or not this teacher comes within the provisions of the statute and that the teacher should be afforded an opportunity to present her side of the case at a hearing before the County Board.

PAYMENT OF PRINCIPAL'S SALARY WHILE SERVING IN GENERAL ASSEMBLY

11 March 1947

I have your letter of March 10, in which you write me as follows:

"I shall appreciate it if you will furnish me with a legal opinion in answer to the following question: Does our office have the legal authority to approve the payment of regular salary to the principal of a public school for time during which the principal is serving as a regular member of the General Assembly?"

G. S. 115-351 provides, in part, that salary warrants for the payment of all State teachers, principals and others employed for the school term, shall be issued each month to such persons as are entitled to the same.

The payment of the salary of a principal is based upon his attendance at the school in the performance of his duties as the school principal. The absence of a principal from school serving as a member of the General Assembly would, in my opinion, make him ineligible to receive the salary of a principal during that time, as it would be impossible for him to be performing the duties of a principal for which the salary was paid, while absent from home attending the General Assembly.

EMERGENCY BONUS; TEACHER ABSENT, SERVING IN THE GENERAL ASSEMBLY

11 March 1947

I have your letter of March 10, in which you write as follows:

"A superintendent of a county school administrative unit has asked us for an answer to the following question: Does a teacher who served until about January 8 or 9 of the current school year and who then became a member of the General Assembly qualify for any part of the emergency bonus as provided under the Supplemental Appropriations Bill which was recently passed by the General Assembly: It seems that this teacher taught through the fifth month of this school term and then resigned to take up his duties as a member of the General Assembly."

The Emergency Bonus Act, in Section 2, provides that the "emergency bonus herein provided for shall be payable to all teachers and State employees of the State on November 1, 1946, and who have continued in such employment until February 25, 1947."

Since the teacher referred to has not continued in the employment of the State as a teacher since becoming a member of the General Assembly and was not teaching on February 25, 1947, I regret to say that, in my opinion, the provisions of the Emergency Bonus Act would not apply to such person and he would not be entitled to the bonus, as he is expressly excluded by the terms of this Act which I have quoted.

SCHOOLS; COMMITTEEMAN MAY NOT TEACH IN PUBLIC SCHOOL OR PRIVATE SCHOOL RECEIVING PUBLIC FUNDS

16 April 1947

I acknowledge receipt of your letter enclosing a letter from Superintendent H. D. Browning, Jr., of the Wilson County Schools inquiring as to whether or not a school committeeman is eligible to teach a class in the Veterans' Training Program under the supervision of the local agricultural teacher.

Section 115-132 of the General Statutes reads as follows:

"No person while serving as a member of any district committee shall be eligible to be elected as a teacher of any public school, or as a member of the county board of education, and should such person be elected to teach in any public school or private school receiving public

funds or as a member of the county board of education before resigning as a member of the district committee, said election is hereby declared null and void."

I assume that the class in Veterans' Training is taught as a part of the agricultural course in one of the public schools; and if this is true, a member of the local school committee would not be eligible as such teacher. While I think that the term "public funds," as used in the pertinent section of the statutes, means State or county funds, I cannot be sure of this and I would hesitate to advise a school committeeman to teach a class in the Veterans' Training Program, even though it is not taught as a part of the public school system, if public funds of any nature whether Federal, State, or county are used.

NORTH CAROLINA STATE TRADE SCHOOL FOR VETERANS; ADMINISTRATION
AND APPROPRIATION COMMITTED TO STATE BOARD OF EDUCATION

30 April 1947

You have consulted with me about House Bill No. 604, entitled "An Act to appropriate funds for the establishment of a vocational school for veterans at Camp Butner, North Carolina." Section 1 of this Act provides that there shall be established a State trade school for veterans to be known as THE NORTH CAROLINA STATE TRADE SCHOOL FOR VETERANS. Section 2 sets out the purpose for which the school is to serve. Section 3 of the Act states as follows:

"The said school is to be operated by the Division of Vocational Education of the State Department of Public Instruction."

Sections 7 and 8 make appropriations for carrying out the purposes of the Act.

The conference with you related to the question as to whether or not the supervision of the expenditure of the appropriation made by this Act and of the school established by the Act is under the jurisdiction and authority of the State Board of Education.

It is my opinion that the school would be operated by the Division of Vocational Education, which is now a division and agency of the State Board of Education, subject to the authority of the State Board of Education, and the appropriations made by this Act are, in effect, appropriations to the State Board of Education for the purpose of conducting this school.

I have consulted with Dr. Clyde A. Erwin, Mr. J. Warren Smith and others who are familiar with the legislative history of this Act, and the conclusion which I reach seems to be in accordance with the express intent of the drafters of this legislation and those who presented it for consideration by the General Assembly.

SCHOOLS; SUPPLEMENTS; EXTENDING TERM FOR TEACHERS

28 May 1947

I have your letter of May 27, in which you write me as follows:

"Our office has been asked for information indicating whether or not it is legal for local supplementary school taxes to be used for the pur-

pose of providing a school term in excess of 180 days. One local school administrative unit is considering the possibility of having teachers report two or three days prior to the actual opening of the school and continuing on duty two or three days following the actual closing of the school and counting these extra days as a part of the school term, the cost of which would be met from local supplementary school taxes.

"We shall appreciate a legal opinion on this question."

G. S. 115-361, providing for local supplements, contains the limitation "but in no event to provide for a term of more than 180 days." This limitation, in my opinion, would prevent the local supplement from being used for the purpose of paying teachers for a school term of more than 180 days. There is, of course, a different provision as to principals, with which you are familiar.

COUNTY FINANCE ACT; SCHOOLS; ISSUANCE OF BONDS FOR THE PURCHASE OF SCHOOL BUSES

4 June 1947

I received your letter of June 3, enclosing a letter to you from Mr. H. D. Browning, Jr., County Superintendent in Wilson County, in which he requests you to advise him whether or not bonds could be issued by the county for the purchase of school buses.

The purposes for which bonds can be issued by a county are controlled by the provisions of G. S. 153-77, which is a part of the County Finance Act. This Act authorizes the issuance of bonds for the erection and purchase of school houses and by an amendment adopted in 1947 by Chapter 931 (House Bill 679), G. S. 153-77, paragraph (a), was rewritten to read as follows:

"(a) Erection and purchase of schoolhouses, school garages, physical education and vocational education buildings, teacherages, lunchrooms, and other similar school plant facilities."

There is no authority in the County Finance Act to issue bonds for the purchase of school buses.

Unless there is some local statute applicable to Wilson County, of which I am not advised, granting this authority, there is no authority to issue bonds for this purpose. Mr. Browning might confer with his Representative, Honorable Larry I. Moore, Jr., to whom I am sending a copy of this letter, who can inform him as to whether or not there is any local Act in Wilson County which would permit this to be done.

PAYMENT OF PRINCIPAL'S SALARY WHILE ON LEAVE OF ABSENCE

6 June 1947

The question has arisen as to the payment of a principal's salary while he was absent part of the school term attending as a member of the General Assembly. The principal is Mr. Bruce Hunter, of Onslow County, who served as a member of the last General Assembly but who also actually served as Principal in his school on Monday of each week during the session. He also employed a substitute Principal to take his place while he was absent and paid this Principal.

I understand that Mr. Hunter was granted a leave of absence by the County Board of Education under authority of the rules adopted by the State Board of Education, Section 3(A) (5), and that under the regulations of the County Board the extension of time beyond twenty days, which occurred between the meetings of the Board, was approved at a later meeting of the Board under regulation Section 3(B).

Under these circumstances, I think you would be justified in paying the Principal's salary to Mr. Hunter, from which he would pay the substitute Principal serving in his absence.

COMPULSORY SCHOOL ATTENDANCE LAW; AGE LIMITS OF STUDENTS
REQUIRED TO ATTEND SCHOOL

10 September 1947

In your letter of the 9th of September, 1947, you enclose a letter from Mr. H. D. Browning, Superintendent of the Wilson County Schools, wherein he inquires what is meant by the phrase "seven years" in determining when a child is required under the compulsory school attendance law to attend school. He also inquires what is meant by the term "sixteenth birthday," and if a child is required to attend school under this law if his sixteenth birthday is reached during the school term.

The statute, G. S. 115-302, provides that all children in this State between the ages of seven and sixteen years are required to attend the schools of the State continuously for a period equal to the time which the public school in the district in which the child resides shall be in session.

Your attention is invited to the language appearing in this section, as follows: "between the ages of seven and sixteen years."

This office is of the opinion that the compulsory school attendance law referred to above applies to those children who have reached their seventh birthday prior to the opening of school as well as to those children who reach their seventh birthday after a term of school has begun.

This office is also of the opinion, and has so ruled on numerous occasions, that the compulsory school attendance law does not apply to a child after he has reached his sixteenth birthday. This would be true even though the sixteenth birthday was reached during a term of school.

SCHOOLS; ATTENDANCE AGE; TRANSFER OF CHILD FROM OUT-OF-STATE

13 September 1947

I have your letter of September 17, in which you enclose a letter from Mr. B. B. C. Kesler, Superintendent of the Onslow County Schools, in which Mr. Kesler submits the following question to you:

"If a child six years old after October 1 is attending school, either a private [school] in this State or a public [school] in another State, can this child be transferred to our public schools in this State, after he becomes six years of age?"

G. S. 115-371 provides that children, to be entitled to enrollment in the public schools, must be six years of age on or before October 1 of the year in which they enroll and must enroll during the first month of the school year.

This section makes it necessary for a child to be six years of age on or before the first day of October in order to be entitled to enrollment in a public school for that year, and must be enrolled within the first month of the school year. This section, I think, answers the question, and the fact that a child had attended a public school in another State or a private school would not entitle the child to transfer to our public schools, unless the child had reached six years of age on or before October 1.

SCHOOLS; USE OF CAPITAL OUTLAY FUNDS

22 September 1947

I acknowledge receipt of your letter of September 12 enclosing a letter from Superintendent John W. Comer of the Surry County Schools in which he states that several of the school buildings of the county are in such poor state of repair that it is desirable to use Capital Outlay Funds for repairing said buildings.

He inquires whether or not Capital Outlay Funds may be used for the desired purpose.

Capital Outlay Funds for school purposes are allocated by the County Board of Commissioners to the County Board of Education, and Section 115-157 Paragraph B requires that Capital Outlay Funds be used for the purchase of sites, the erection of school buildings, including dormitories and teachers' homes, improvement of new school grounds, alteration and additions to buildings, installation of hearing, lighting and plumbing, purchase of furniture, including instructional apparatus for new buildings . . ." In the same section, Paragraph A (4) provides that upkeep of grounds, repair of buildings, repair and replacement of heating, lighting, and plumbing equipment . . . and other necessary expenses of maintenance be paid out of current expense funds.

It, therefore, appears that Capital Outlay Funds may not be used for general repair of existing school buildings. But the funds for both Capital Outlay and current expenses are provided by the County Board of Commissioners and it seems to me that if the current expense funds have been exhausted and a surplus remains in the Capital Outlay Account that the County Board of Commissioners could by proper resolution on application of the Board of Education transfer the desired amount of the Capital Outlay funds to the current expense fund for the purpose of repairing existing school buildings.

SCHOOLS; PARLIAMENTARY PROCEDURE, POLK COUNTY SCHOOLS

21 October 1947

I have just discussed with you over the telephone a letter which I have received from Mr. W. D. Ledbetter of Rutherfordton, N. C., in which he discusses in detail the existing situation involving Sunnyview School and Mill Springs School in Polk County and the Boards of Education of Polk and Rutherford Counties.

Mr. Ledbetter's inquiry seems to be narrowed down to the question of the status of the motion made by a member of the Polk County Board of Education and seconded but no vote being taken because the chairman im-

mediately resigned and the question was not put to the remainder of the board. Of course, I know of no statute which answers this question, but it seems to me that even though a motion was made and seconded that it had no effect because it was not voted upon by the board. It seems to me that the status remains the same as before the motion was made and seconded. In other words the motion would have to be made and seconded and carried at a subsequent meeting of the board before the motion is effective.

SCHOOL LAW; USE OF SCHOOL BUSES

10 November 1947

In your letter of the 7th of November, 1947, you make reference to G. S. 115-374 and inquire if the State Board of Education has any authority to permit the use of school busses beyond the limits of the county or health district in which such school busses are normally operated.

This law was amended by Chapter 283 of the Session Laws of 1947 by adding a new sentence in the second paragraph immediately following the first sentence therein, which reads as follows:

"The State Board of Education is authorized and empowered, under rules and regulations to be adopted by said board, to permit the use and operation of school busses for transportation of school children and school employees within the boundaries of any county or health district to attend State planned group educational or health activities, specifically excluding athletic or recreational activities, which educational or health activities in the judgment of the State Board of Education are directly connected with the public school program as administered within the counties of the State, and which are conducted under the auspices or with the sanction of the State Board of Education."

The effect of this amendment is to extend the authority of the State Board of Education to permit the use of such school busses for the additional purpose named in the 1947 Act, that is to say, to permit the use and operation of school busses for transportation of school children and school employees within the boundaries of any county or health district to attend State planned group educational or health activities, excluding athletic or recreational activities.

It is the opinion of this office that this amendment does not alter or in any wise affect the authority of the State Board of Education to permit the use of school busses for the other purposes set out in the law. It is the further opinion of this office that permission may be given by the State Board of Education to use such school busses only within the limits of the county or health district for the purposes set out in the 1947 Act.

SCHOOL LAW; USE OF SCHOOL BUSES

29 December 1947

In reply to the inquiry submitted to you by Mr. Walter R. Dudley, Superintendent of the Red Springs City Schools, of the 16th of December, 1947, you are advised that there is no statutory authority for a board of education to accept, as a gift, a school bus from a local baseball club, the only

consideration for the gift being that the baseball club be permitted to use the bus during the summer season for the transportation of its teams on baseball trips.

SCHOOLS; REPAIRS TO BUILDING ON SITE NOT OWNED BY SCHOOL BOARD

30 December 1947

I acknowledge receipt of your letter of December 22 enclosing a letter from Superintendent Ready of the Roanoke Rapids Public Schools making inquiry as to the authority of the school board to make repairs to an armory building which is used on occasions for the high school basketball games.

Mr. Ready states in his letter:

"The Armory was built on school property and the school deeded the land without charge. In return for this, it was understood, though I have no written record to that effect, that the Armory would be available to the public school without charge.

"During the years the property has been allowed to run down. It is officially looked after by an Armory Committee, made up of the local County Commissioner, the Mayor of the City and the Chairman of the School Board. This Committee has leased the Armory to a National Guard Unit.

"In order to put the Armory in good repair and to continue its operation in a satisfactory manner, the National Guard Unit has requested an appropriation for repairs from each of the three Governmental units represented on the Armory Committee and wants a further monthly appropriation from each unit for maintenance.

"The school does use the Armory quite a bit during the basketball season. This season lasts from about December 1 to March 1. The school also might on other special occasions want to use the Armory, though this happens very rarely.

"Does the School Board have any right to appropriate any money for repairs to the Armory? Does it have any right to appropriate money for maintenance during the twelve months' period? Does it have any right to pay rent for the Armory during the three months of the basketball season, particularly in view of the circumstances surrounding the building of the Armory?"

Section 115-88 of the General Statutes reads in part as follows:

"The county board of education or the board of trustees of the city administrative unit shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the said board. . . ."

It thus appears that your school board does not have the authority to appropriate money for repairs to the armory which is not located on a site owned by the school board. As to whether or not the board may rent the armory depends on whether or not its use is necessary to the operation of the nine months school term. If your board of trustees passes a resolution finding that the use of the armory is essential to the operation of the school, it seems to me that it would have authority to pay a reasonable rent for its use, but I doubt seriously as to its authority to rent the building solely for the use of the basketball team.

SCHOOLS; PLAYGROUNDS; LIABILITY OF STATE BOARD OF EDUCATION AND
LOCAL SCHOOL AUTHORITIES; INJURIES TO CHILD;
DEFECTIVE EQUIPMENT

13 January 1948

I received your letter of January 12, enclosing a letter from Mr. H. D. Browning, Jr., Superintendent of Schools in Wilson County. In this letter Mr. Browning inquires as to the liability of the State or local school authorities for compensation in the amount of medical bills incurred by a parent for a child who was injured by the breaking of a support, to which a swing was attached, on the school playgrounds. Mr. Browning advises that local interested school groups were instrumental in raising funds for the playground equipment which was the cause of the injury in this instance and which had been used by the children during recess and lunch periods as an organized part of the program of the school.

In a number of opinions expressed by this office, in some of which the matter was gone into in some detail, the view was expressed that there was no liability on the part of the local school authorities or the State for such injuries, and this would be true although the injury was caused by defective equipment used on the school playgrounds. There would be no liability whatever on the part of the State Board of Education or the Wilson County Board of Education in such an instance. The only cases in which compensation is provided to be paid by the State are those in which a child is injured by the operation of a school bus on the school grounds, and the operation of school buses going to and from the school.

SCHOOLS; EXTENSION OF CITY ADMINISTRATIVE UNIT BOUNDARIES; SITES
ACQUIRED MUST BE WITHIN THE BOUNDARIES

5 March 1948

I acknowledge receipt of your letter of March 1 in which you enclose a letter from Superintendent Harry P. Harding of the Charlotte City Schools in which he inquires as to whether or not the proper school authorities may enlarge the boundaries of the Charlotte City Administrative Unit so as to include a site, upon which it is proposed to construct a school building, located outside of the unit's boundaries.

I am enclosing herewith a copy of a letter which I have heretofore written to Honorable John D. Shaw, City Attorney of Charlotte, which expresses the opinion of this office as to the location of school sites.

It will be noted that in the letter to Mr. Shaw I stated that, in the absence of a Public Local Act, the enlargement of the city administrative unit boundaries must be made by the State Board of Education and that I did not want to express to him an opinion as to whether or not the boundaries should be enlarged unless requested to do so by the State Board of Education.

Section Six of Chapter 1077 of the Session Laws of 1947 amended G. S. 115-352 so as to read:

"Provided, that the State Board of Education may, in its discretion, alter the boundaries of any city administrative unit and establish addi-

tional city administrative units, when, in the opinion of the State Board of Education, such change is desirable for better school administration."

It, therefore, appears that it is a matter entirely within the discretion of the State Board of Education as to whether or not the boundaries of the Charlotte City Administrative Unit should be altered so as to include the proposed new territory.

SCHOOLS; TRANSFER OF FUNDS FROM ONE OBJECT TO ANOTHER
IN CURRENT EXPENSE FUND

10 March 1948

I acknowledge receipt of your letter of March 5 in which you enclose a request on the part of the New Bern City Schools for a revision of the City School Fund Budget. The question posed in your letter is as to whether or not the funds may be transferred from Capital Outlay to fixed charges in the current expense fund to provide for the payment of an insurance account of \$1,292.92.

I discussed this matter with you yesterday. I am unable to ascertain from the request of the City Schools as to whether or not they propose to transfer funds from the Capital Outlay Account to the Current Expense Account. I note that one of their sources of income is from "summer school tuition" in the sum of \$1,045.76 and it may be that there are other funds which might constitute a surplus. I do not think that there is any question but what the County Board of Commissioners and the State Board of Education have the authority to authorize the transfer of funds from one item within a current expense account to another item if there is found to be a surplus in the funds allotted to the first item. In this case it appears that there is a surplus of \$1,045.76 which could be used for any purpose within the current expense account upon approval of the Board of County Commissioners and the State Board of Education.

SCHOOLS; TEACHING DAYS REQUIRED; EXTENSION OF TEACHING
HOURS; EFFECT OF

7 April 1948

I received your letter of April 6, in which you write me as follows:

"The question has been raised as to whether there is legal authority for paying teachers and other school personnel (such as principals and janitors) for a longer school day than the regular length fixed by law. Specifically, is there legal authority for running the school day two extra hours each day and carrying over the two extra hours as credit on another school day? Does our office have the authority to approve the issuance of salary vouchers for such extra time served and carried over as credit on another day?"

Our School Machinery Act, G. S. 115-351, provides that the "minimum six months' school term required by Article IX of the Constitution is hereby extended to embrace a total of one hundred and eighty days of school in order that there shall be operated in every county and district in the State a uniform term of nine months. . . ."

This statute has certain exceptions which are not applicable to the question which you submit. This statute further provides as follows:

"A school month shall consist of twenty teaching days. Schools shall not be taught on Saturdays unless the needs of agriculture, or other conditions, in the unit or district make it desirable that schools be taught on such days. In order that the total term of one hundred and eighty days might be completed in a shorter time than nine calendar months, when the needs of agriculture require it, the governing body of any administrative unit may require that schools shall be taught on legal holidays, except Sundays, but nothing herein contained shall prevent the inclusion of teaching on any legal holiday in a school month in accordance with the custom and practice of any such district, or as may be otherwise ordered by the governing body of such administrative unit."

As you will observe in the quoted portions of the School Machinery Act, no provision is made for permitting anything less than the designated number of days of teaching. The days required by the statute to be taught must be calendar days or the hours within calendar days during which the school is conducted. The number of days required to be taught could not be met by providing for running the school extra hours on a calendar day, as this would not be within the terms of the statute.

It is my opinion, therefore, that your office would not have the authority to approve the issuance of salary vouchers on the basis of extra days claimed by reason of teaching over hours on the days the schools are required to be conducted.

SCHOOLS; NEITHER STATE, COUNTY NOR LOCAL SCHOOL COMMITTEES
ARE LIABLE FOR TORT ACTION

3 June 1948

I acknowledge receipt of your letter of May 31 enclosing a letter from Superintendent H. L. Joslyn of the Carteret County Schools, in which he sets out certain details relating to injuries sustained by a fifth grade school boy in a fall at the Morehead City School, and inquiring as to whether or not there is any liability on the part of the school boards or its members for such injuries.

Neither your county board of education nor your local school committee would be liable for damages in tort since it is an agency of the State. See *BENTON v. BOARD OF EDUCATION*, 201 N. C. 653; and *BRIDGES v. CHARLOTTE*, 221 N. C. 472.

The general rule as to the personal liability of public officers for an injury caused by their official acts is that such liability will attach when the cause of action is based on failure to perform or the negligent performance of a ministerial duty, but when the duty is discretionary, the officer's conduct must be corrupt and malicious if there is to be any liability. *BETTS v. JONES*, 203 N. C. 590; *MOFFITT v. DAVIS*, 205 N. C. 565.

I do not think that either the county board of education, the local school committee, or the individual members thereof are liable for damages for the injuries of the school pupil sustained under the circumstances set out in Superintendent Joslyn's letter.

OPINIONS TO COMMISSIONER OF BANKS

BANKS; ACCEPTANCES; LETTERS OF CREDIT; LIMITATIONS OF AMOUNT

9 July 1946

I received your letter of July 6, enclosing to me a letter to you from Mr. Hilary W. Lucke, Assistant Vice-President of the National City Bank of New York, under date of July 2, as to which you request my opinion.

Mr. Lucke states that a North Carolina firm has requested its North Carolina State bank to open, through The National City Bank, a sight commercial letter of credit, documents against cash, in favor of a beneficiary in Mexico, covering the importation of lumber to the United States, to be issued under the protection of the North Carolina bank, the aggregate amount involved in the transactions equaling approximately the capital and permanent surplus of the North Carolina bank. He inquires as to whether this transaction is subject to the limitations on loans provided by G. S. 53-48.

It seems to me that this transaction, or these transactions, would be subject to the limitations provided by G. S. 53-56, as the transactions described are substantially the ones with which this section deals.

You will observe that the section defined the word "goods" to include goods, wares, merchandise, or agricultural products, including livestock. In my opinion, lumber would be included within the definition.

You will observe that the limitation provided, whether in a foreign or domestic transaction for any one person, firm or corporation, is twenty-five per cent of its capital and permanent surplus, "unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. The limitation is, therefore, conditional upon the things set out in the statute above quoted. The proposed transactions are not sufficiently described in detail for me to have any opinion as to whether or not the transactions are such as to remove the twenty-five per cent limitation.

EDUCATIONAL INSTITUTIONS; AUTHORITY OF NORTH CAROLINA STATE
COLLEGE FOUNDATION AND THE UNIVERSITY OF NORTH CAROLINA
FOUNDATION TO BORROW MONEY PLEDGING LEASE AGREEMENTS;
UNIMPAIRED CAPITAL SURPLUS WACHOVIA BANK
AND TRUST COMPANY

9 August 1946

I acknowledge receipt of your letter enclosing a letter from Mr. B. S. Womble, Attorney at Law, Winston-Salem, North Carolina, dated August 5, 1946, in which he raises certain questions as to the authority of the University of North Carolina, the University of North Carolina Foundation, Inc., the North Carolina State College Foundation, Inc., and the Wachovia Bank and Trust Company to enter into certain agreements providing funds for the erection of dormitories on the campuses at The University of North Carolina and North Carolina State College. You enclosed a copy of the agreements bearing dates of April 26 and June 13, 1946.

Inquiry is made as to my opinion on the following questions:

"(1) Are The University of North Carolina Foundation, Inc., and North Carolina State College Foundation, Inc., respectively, authorized under their respective charters to borrow the money to erect the dormitories and to engage in the other activities contemplated in the contracts executed by them, respectively, copies of which are hereto attached?"

I have carefully examined the charters of the University of North Carolina Foundation, Inc., and North Carolina State College Foundation, Inc., and in my opinion, they contain ample authority to enter into the agreements providing funds for the erection of dormitories upon the campuses of The University of North Carolina and North Carolina State College.

"(2) Is the University of North Carolina legally authorized to execute the contracts, copies of which are attached hereto, and to assume the obligations on its part as set out in such contracts?"

I am of the opinion that the University of North Carolina has the legal authority to enter into said contracts and to perform the duties imposed upon it by said contracts. I have heretofore approved said agreements as to form and legality.

"(3) The unimpaired capital and permanent surplus of Wachovia Bank and Trust Company is now \$12,500,000. In view of the obligations of the University of North Carolina under the two contracts above mentioned with regard to making payments upon the two loans, will Wachovia Bank and Trust Company violate Section 53-48 of the General Statutes of North Carolina by making these two loans totalling \$2,300,000?"

Assuming that you are correct in stating that the unimpaired capital and permanent surplus of Wachovia Bank and Trust Company is now twelve million five hundred thousand dollars (\$12,500,000), I am of the opinion that the bank would not violate the provisions of Section 53-48 of the General Statutes by making the two loans totalling two million three hundred thousand dollars (\$2,300,000). As you know, there are two separate loans, one in the sum of one million one hundred thousand dollars (\$1,100,000), made to the North Carolina State College Foundation, Inc., as provided by indenture of April 6, 1946. The note evidencing this loan is executed by the North Carolina State College Foundation, Inc., and it is the sole obligee. The University of North Carolina assumes no financial or other responsibility under the provisions of the contract except to collect the rents and properly account for the same as therein provided.

The other loan of one million two hundred thousand dollars (\$1,200,000) is made by the Wachovia Bank and Trust Company to the University of North Carolina Foundation, Inc., and the same facts, other than the amount of the loan applicable to the North Carolina State College Foundation, Inc., are applicable to the loan to the University of North Carolina Foundation, Inc. The loans, totalling two million three hundred thousand dollars (\$2,300,000) by the Wachovia Bank and Trust Company are two separate loans made to two separate corporations, and, as above stated, it is my opinion the bank will not violate the provisions of Section 53-48 of the General

Statutes by entering into the two separate agreements with the North Carolina State College Foundation, Inc., and the University of North Carolina Foundation, Inc., respectively.

BRANCH BANKING & TRUST COMPANY, WILSON, NORTH CAROLINA

6 September 1946

I received your letter of September 5, a copy of which appears to have been sent to Mr. H. D. Bateman, President of the Branch Banking & Trust Company, with enclosed copy of a sheet from the report of the examination of this bank at the close of business on June 19, 1946, with reference to liabilities not shown on the books amounting to a total of \$2,694.80, consisting of certified checks outstanding, \$2,422.69; outstanding drafts, \$224.26; and outstanding expense checks, \$47.85, which had been seized by the bank on July 16, 1945, and placed in their undivided profits account.

I have read with interest the letter from Mr. H. D. Bateman, President, under date of September 3, 1946, in which he states with reference to these items, as follows:

"This bank was organized seventy-four years ago, and since that time has issued thousands, probably millions, of checks of various kinds including certified checks, drafts on probably 50 to 100 different correspondent banks, expense checks, cashier's checks, etc. In the past twenty years we have assumed the liabilities of several other banks. Naturally, under such circumstances, many errors can and do occur and many of them, for obvious reasons, are never discovered and corrected.

"Many of these particular items were ostensibly liabilities of banks which we had absorbed. Practically all of the original records were destroyed, lost, or misplaced. The names of the payees have long since been obliterated. Not only in the banking business, but in every other kind of business, items of this nature over a period of years tend to accumulate. We thought it was time to clean up. There were no names on the records to indicate to whom the money might belong. In all probability, the items appeared to be outstanding as a result of errors which had occurred over a period of years and never discovered or corrected. Wherever possible, we contacted the ostensible owners of various outstanding items, settled with them, and cleared our records. In these particular cases, it was impossible to do so and we believe that they appeared as outstanding, due to errors."

It is observed that in the letter from you to Mr. Bateman under date of August 28, 1946, a copy of which was enclosed, you state that in view of the fact that Section 53-105 of the General Statutes requires that all resources, assets and liabilities of the bank shall be shown in each Call Report, you are inclined to think that all Call Reports which have been published since July 16, 1945, have been incorrect and that, on this account, it is possible there is a violation of G. S. 53-130.

An examination of the banking law found in Chapter 53 of the General Statutes does not reveal any law under which any bank in this State would be authorized to place in its undivided profits account any liabilities of the character detailed in the Bank Examiner's Report. These items remain as liabilities of the bank and would have to be paid upon demand therefor by the persons entitled thereto, and the lapse of time with respect to time would not convert these liabilities into bank assets.

Unless the bank was able to point out definite errors which could be ascribed to the particular items so that the necessary corrections could be made with reference to them, I do not believe that the fact that errors do occur in banks' "Over and Short" accounts would justify the absorption in the profit account of definite liabilities of this character. In the event the persons entitled to these items should never claim them, they would not perforce become the assets of the bank but might, under the Constitution and laws of this State, escheat to the University of North Carolina.

BRANCH BANKING & TRUST COMPANY, WILSON; SERVICE CHARGES;
INACTIVE ACCOUNTS

6 September 1946

I received your letter of September 5, a copy of which appears to have been sent to Mr. H. D. Bateman, President of the Branch Banking & Trust Company, quoting from a report of the examination of the Fayetteville Branch of this bank as of June 22, 1946, criticizing the service charge of fifty cents per account per year on demand deposits which have shown no activity for one year or more. I have noted with interest the letter from Mr. H. D. Bateman, President, under date of September 3, 1946, and copy of your letter to him of August 29.

G. S. 53-104 provides as follows:

"Every bank, corporation, partnership, firm, company, or individual, now or hereafter transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this state, shall be subject to the provisions of this chapter, and shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise control of and supervision over the banks doing business under this chapter, and it shall be his duty to execute and enforce through the State Bank Examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this chapter, as may in its opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the State Banking Commission."

You will observe that this quoted section provides that the State Banking Commission is empowered to promulgate such rules and regulations and instructions, not inconsistent with the provisions of this chapter, as may be necessary to carry out the provisions of the laws relating to banks and banking as is therein defined, *and as may be found necessary to insure*

safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks.

I believe it is entirely within the power of the State Banking Commission, under authority of this section, to adopt rules and regulations which would prescribe the service charges which could or could not be made by banks operating in this State, in the interests of the depositors and the public in their relations with such banks, but I understand that thus far the State Banking Commission has not adopted any rules or regulations which would prevent the making of the service charge which has been adopted by the Branch Banking & Trust Company with respect to these inactive accounts. The Commissioner of Banks and the State Bank Examiners are, of course, confined to the enforcement of the State banking laws and the rules and regulations adopted by the State Banking Commission.

Under these circumstances, I am, therefore, of the opinion that Mr. Bateman is correct in stating that the criticism in this respect, of these charges, is not authorized by the State banking laws or the rules and regulations of the State Banking Commission.

BANK OF MAYODAN, MAYODAN, NORTH CAROLINA; PENSION FUND OF
WASHINGTON MILLS COMPANY; WHETHER BANK MUST QUALIFY
UNDER G. S. 53-159 AS TRUST COMPANY

9 September 1946

I received your letter of September 6, enclosing a letter from Mr. J. C. Johnson, President of the Bank of Mayodan. In your letter you state that the bank wishes to handle a Pension Fund of the Washington Mills Company, as described in the letter of Mr. Johnson, but you are inclined to think that if the bank has the authority to buy and sell bonds, it will be necessary for it to open a Trust Department and pay the required license fee. You state, however, that if the operation of the Pension Fund is under the full control of the Pension Committee and the bank merely acts as depository for the fund and the bonds, it should not be required to open a Trust Department and pay the license fee, and you request my opinion in regard to the matter.

Article 14 of Chapter 53 of the General Statutes, dealing with banks acting in a fiduciary capacity, provides in G. S. 53-159 that any bank licensed by the Commissioner of Banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond. G. S. 53-160 provides that before any such bank is authorized to act in any such fiduciary capacity without bond, it must be licensed by the Commissioner of Banks and pay the annual license fee of \$200.00.

If the Bank of Mayodan accepts the responsibility for acting as trustee for the proposed Pension Fund, whether or not it exercises power of reinvestment and sale of securities, I think it would come within the designation as acting as a trustee and, therefore, subject to the provisions of Article 14. You will observe from reading the provisions of Article 14 that the statute does not attempt to define what does and does not constitute a bank acting as a trustee or in any fiduciary capacity, or place any limitations upon the application of this term.

If the bank should attempt to act as a trustee with authority to pay the pensions and sell the securities for the purpose of providing the funds in accordance with the pension plan, it does seem to me that it would be acting as a trustee within the meaning of the statute.

BANKS AND BANKING; STOCKHOLDERS' BOOK; RIGHT OF STOCKHOLDER TO SEE

21 October 1946

I have your letter of October 18, 1946, enclosing an inquiry from Dr. A. F. Williams of Wilson, North Carolina. He asks if he is within his rights in asking the president of a bank in which he is a stockholder to let him see the stock book.

Section 53-85 of the General Statutes requires that the directors of a bank shall keep a stock book, stating the name of each stockholder and the number of shares held by each. This section also requires that the book shall be subject to the inspection of the directors, officers and stockholders of the bank at all times during the usual hours for the transaction of business.

BANKS; UNCLAIMED BANK DEPOSITS; DUTY OF THE BANK EXAMINERS AND COMMISSIONER OF BANKS WITH REGARD THERETO

6 January 1947

I have your letter of January 3, in which you write me as follows:

"Do you think it is my duty, as Commissioner of Banks, to instruct the state bank examiners to check the records of all state banks under examination and report to me if the bank under examination has complied with G. S. 116-24 and to include this as an item in their reports of examination?"

"If the report of the state bank examiner shows that the bank under examination has not complied with G. S. 116-24, would it be a violation of G. S. 53-134, and would it be my duty to report the violation to the solicitor of the district in which the bank is located?"

"If failure of the bank to comply with the provisions of G. S. 116-24 is not a criminal violation, then what is my duty in the matter?"

It is my opinion that it is the duty of the Commissioner of Banks to instruct the state bank examiners to check the records of all state banks under examination and report to you whether or not the bank under examination has complied with the provisions of G. S. 116-24, and to include this as an item in their reports of examination. G. S. 116-24 provides as follows:

"All bank deposits in connection with which no debits or credits have been entered within a period of five years, and where the bank is unable to locate the depositor or owner of such deposit, shall be deemed derelict property and shall be paid to the University of North Carolina and held by it, without liability for profit or interest, until a just claim therefor shall be preferred by the parties entitled thereto; and if no such claim shall be preferred within ten years after such deposit shall be received by it, then the same shall be held by it absolutely. The receipt of the University of North Carolina of any deposit hereunder shall be and constitute a release of the bank delivering over any deposit coming within the provisions of this section from any liability therefor to the depositor or any other person."

I have heretofore rendered an opinion, dated 31 May 1946, interpreting this section, copies of this opinion I understand you have sent out in mimeographed form to the banks of the State.

Your second inquiry is as to whether or not, if the examination discloses that a bank has failed to comply with the provisions of G. S. 116-24, this would be a criminal violation of the law regulating banks which, under G. S. 53-134, it would be your duty to report to the solicitor of the district in which the bank is located, and, if it is not a criminal violation, then what is your duty in the matter.

It is my opinion that ordinarily the failure of a bank to comply with the provisions of G. S. 116-24, by permitting derelict and inactive accounts to remain on their books with no action taken with respect thereto, would not amount to a criminal act on the part of the bank or its officers. If the bank should, however, convert such inactive and derelict accounts into assets instead of liabilities by transferring the accounts to their profit account, this would violate the law against false statements by the bank and its officers, which would constitute a criminal offense.

Under the supervisory authority given to the Commissioner of Banks and the Banking Commission, the enforcement of the law as to inactive and derelict accounts as provided in G. S. 116-24 could be by the Commissioner of Banks and the Banking Commission in the same way that its other regulatory powers may be enforced. G. S. 53-119 authorizes the Commissioner of Banks to remove from office any officer, director or employee of any bank doing business under this chapter, who persistently violates the laws of this State or lawful orders, instructions and regulations issued by the State Banking Commission.

BANKS; RIGHT TO ASSUME LIABILITY FOR INTANGIBLE TAX ON DEPOSITS

20 January 1947

I have your letter of January 17, enclosing to me a letter from Mr. Robin Hood, Cashier of The Northwestern Bank at Hickory, North Carolina, in which he inquires as to whether or not it is lawful for a bank in North Carolina to absorb the North Carolina intangible tax for either their checking accounts or savings accounts. He also inquires, if this is lawful, whether or not he could advertise that such taxes would be absorbed.

G. S. 105-199, providing for intangible tax for money on deposit, provides that the tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State, and that any taxes so paid as agent for the depositor shall be recovered from the owners thereof by deduction from the account of the depositor.

Notwithstanding this provision which fully authorizes a bank to deduct the tax paid from the account of the depositor, it is my opinion that any bank would have a right to not make this deduction but, itself, to pay the tax for its depositors as a consideration for the deposit benefits accruing to the bank.

There is nothing in this statute or any other statute that prohibits a bank from advertising that it will pay the intangible tax for its depositors. This is unlike the sales tax act which prohibits a merchant from advertising that he will assume the sales tax for his customers.

I understand that The Northwestern Bank is not a member of the Federal Reserve System and, therefore, no question would arise as to the violation of any rules or regulations of the Federal Reserve Board.

BANKS AND BANKING; PRIVATE BANKERS; AUTHORITY TO
OPERATE IN NORTH CAROLINA

7 May 1947

I received your letter of April 29, enclosing a letter to you from Dr. James B. Trant, Dean, College of Commerce, Louisiana State University, in which he asks certain questions with reference to the authority of unchartered banks to do business in this State.

It is my understanding that we do not have any unchartered bank or banks in North Carolina, although our statute seems to recognize the right of an individual or private bank or banks to do business in this State. G. S. 53-1 provides that the term "bank" shall be construed to mean any corporation, partnership, firm or individual receiving or soliciting or accepting money or its equivalent on deposit as business.

G. S. 53-127 provides that "no person, association, firm or corporation domiciled within the State of North Carolina, except corporations, persons, associations or firms reporting to and under the supervision of the Commissioner of Banks . . . shall advertise or put forth any sign as bank, banking, banker or trust company . . . or in any way solicit or receive deposits or transact business as a trust company."

These references would seem to indicate that the law of this State would recognize private banks although the statute, Chapter 53, is silent in other respects as to the manner of the creation of private banks or their supervision. The statute does not seem to further contemplate that private banking is to be conducted in this State but I could not say that, under the statute as it now is, it is prohibited. I think, probably, the statute ought to be clarified in this respect at the next General Assembly.

BANKS; LIMITATION OF LOANS; BONDS OF THE WORLD BANK

27 May 1947

I have your letter of May 26, enclosing a copy of a letter from Mr. S. S. Lawrence, Vice-President of the Branch Banking & Trust Company, Wilson, North Carolina, under date of May 24, in which Mr. Lawrence writes:

"As you know, the World Bank is planning to offer to the investing public in the near future an issue of bonds. Are North Carolina state banks permitted to invest or deal in these securities without limitation or are they limited to the same extent as they are with respect to corporate bonds?"

I find no exception made by G. S. 53-48 providing the limitation of loans for banks on account of the bonds issued by the World Bank.

MUNICIPAL TAXATION; MUNICIPAL ORDINANCES; VALIDITY OF ORDINANCE
LEVYING TAX ON INDUSTRIAL BANKS AND NOT ON COMMERCIAL BANKS

2 December 1947

I have your letter of November 17, 1947, in which you request my opinion as to whether a municipal corporation legally may enact an ordinance levying a privilege tax on an industrial bank and not levying a tax on commercial banks. The specific point on which you desire my opinion is whether such an ordinance is discriminatory. Such an ordinance has been adopted by the City of Winston-Salem.

On July 31, 1947, I expressed an opinion to Honorable I. E. Carlyle, Winston-Salem, North Carolina, that the City of Winston-Salem had authority to levy a privilege tax on a Morris Plan or Industrial Bank. The question of whether an ordinance levying a tax on Industrial Banks only is unconstitutional as discriminatory was not presented for consideration and, therefore, I expressed no opinion thereon.

A municipal ordinance which levies a privilege tax on Industrial Banks located in the municipality and which does not levy a tax on Commercial Banks located in said municipality, is not so clearly discriminatory as to warrant an expression of opinion by me that such an ordinance is unconstitutional and void. Originally Industrial Banks and Commercial Banks did entirely separate and distinct types of businesses. The statutes have been amended so that at the present time Commercial Banks are authorized to engage in all the activities of an Industrial Bank. G. S. 53-43, subsection 6(a). Also Industrial Banks are now authorized, subject to the approval of the Banking Commission, to solicit, receive and accept money for deposit subject to check. G. S. 53-141, subsection 7. It is still true, however, that Industrial Banks are not the same as Commercial Banks and are not authorized to engage in all of the activities that Commercial Banks are authorized to engage in. For example, an Industrial Bank may not act in a fiduciary capacity. G. S. 53-159. While it is true that this section provides that any "bank" may act in a fiduciary capacity, the term "bank" is defined by G. S. 53-1 as not including Industrial Banks. It is also true that some Industrial Banks of the State are not now soliciting or receiving checking accounts.

In view of the legal distinctions between Industrial Banks and Commercial Banks and in view of the presumption of validity which the ordinance carries with it (*DURHAM v. R. R.*, 185 N. C. 240; *SUDDRETH v. CHARLOTTE*, 223 N. C. 630), I advise that an ordinance levying a privilege tax on Industrial Banks and levying no tax on Commercial Banks should be obeyed until said ordinance is declared invalid by a court of competent jurisdiction.

PUBLIC MONEYS; BANKS; ABC BOARDS; CLERK SUPERIOR COURT FUNDS

26 January 1948

I have your letter of January 24, in which you enclose me a copy of my letter to you of October 7, 1941, and a letter dated August 4, 1947, to Honorable J. H. Harris, Chairman of the Durham County ABC Board.

You state that in published and call reports of condition and in examiners' reports, deposits of states and political subdivisions are segregated, and that heretofore the ABC funds and moneys to the credit of Superior Court Clerks have not been construed as public funds under that portion of G. S. 153-135, which you quote as follows:

"or money belonging to any county or subdivision thereof."

You request me to give you an opinion as to whether or not ABC funds and clerks' funds on deposit in North Carolina banks are or are not classified as public funds.

In the letter to Mr. Harris it was stated that it was the opinion of this office that ABC funds were subject to the provisions of the statute, G. S. 153-135, the daily deposit law. The funds held by the ABC boards as an agency for the county, and in some cases agency for the counties and cities concerned, are funds belonging to the county and in some cases to the county and a city.

By G. S. 160-409 all cities and towns are subject to be governed by all of the provisions of the County Fiscal Control Act, which includes the provision of the daily deposit law found in G. S. 153-135. Whether the ABC funds are held for both a county and a city, or only for the county, would make no difference in the answer to your question. It is my opinion that in either instance the funds are moneys that belong to the county or municipalities concerned and should be classified as public funds for the purpose of classification made by your department.

As to the funds of the Clerks of the Superior Court, a distinction will have to be made between the funds held by a clerk as trust funds or funds paid in to court for the benefit of some person, firm or corporation and the funds which the clerk deposits which belong to the county. These funds which belong to the county would include fees of the office when the clerk is on a salary basis, and fines and forfeitures which go to the school fund. These funds held by the county, I think, should be classified as public funds. The funds held by the Clerks of the Court as trust funds for the benefit of minors, incompetents, etc., and sums of money which are paid in to the court for the benefit of private individuals, firms or corporations should not be classified as public funds. The clerk in this instance is merely the custodian for the benefit of trustees entitled thereto. I think it is always the practice of the clerks to keep the public funds in a separate account, as distinguished from his trust funds and money paid into his hands under order of court.

NOTARIES PUBLIC; BANKS; OFFICERS OF BANK ACTING AS NOTARY PUBLIC

27 February 1948

I have your letter of February 26, enclosing copy of a letter from Honorable John Kerr, Jr., in which he asked you whether or not there was any law of the State which would prohibit an officer of a bank, such as the cashier, from notarizing the execution of a paper securing a loan made by the bank.

Mr. Kerr referred to G. S. 10-5, which states that it shall be lawful for a notary public, who is a stockholder, director, officer or employee of a bank or other corporation, to take the acknowledgment of any party to any written instrument executed to or by such corporation, etc., unless such notary public is a party to the instrument.

This statute is ample authority for a notary public acting in such cases. The case which Mr. Kerr has in mind, as to a deed of trust given to a building and loan association, may be the case of *MILLS v. BUILDING & LOAN ASS'N.*, 216 N. C. 664, in which the Court held in the circumstances of that case that the trustee named in the deed of trust, who was the secretary treasurer and chief active executive officer of the defendant *cestui que trust*, could not validly foreclose the deed of trust at which the building and loan association became the purchaser.

BANKS; RESTRICTIONS AS TO LOANS TO OFFICERS OR EMPLOYEES;
PARTNERSHIPS COMPRISING OFFICERS, ETC.

12 March 1948

I have your letter of March 11, enclosing copy of a letter from Mr. W. W. Brawley, Cashier of the Peoples Bank & Trust Company of Rocky Mount. In Mr. Brawley's letter he refers to G. S. 53-91 and submits to you the following question:

"It is our understanding that under Section 53-91 of the Banking Laws, loans can be made to a partnership when an officer of the bank is a partner, if prior approval is made by the directors and the other conditions are met.

"Under this section may the directors approve a *line of credit* to a partnership in which an officer is a partner if the line is properly secured? The idea being to obviate the necessity of getting each individual loan approved prior to its inception."

G. S. 53-91 reads as follows:

"No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness. Provided, however, this section shall not apply to directors who are neither officers nor employees of the bank."

Under this section, it is my opinion that each individual loan must be approved as required thereby and a certified copy of a resolution attached to the instrument evidencing the indebtedness. I do not believe that the section would be complied with by a line of credit extended to the borrower, as the section obviously deals with individual transactions or loans.

BANKS; APPROVAL OF LOANS MADE TO OFFICERS, MEMBERS OF
PARTNERSHIP; SECURING LOANS

24 May 1948

I have your letter of May 22, enclosing a copy of a letter to you from Mr. W. W. Brawley, Cashier of the Peoples Bank & Trust Company of Rocky Mount, in which Mr. Brawley writes as follows:

"Under G. S. 53-91 a partnership in which a bank officer is a member, may borrow from that bank only when prior approval is made of each individual loan by a majority of the board.

"Are customers' notes discounted by a bank for a partnership considered a loan to the business? And must they have the prior approval of the directors the same as a direct extension? That is, assuming of course, that the partnership endorses the notes with recourse."

It is my opinion that this type of discount or loan would have to have prior approval of the directors in the same manner as a direct extension of credit. The statute, G. S. 53-91, provides that no officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from a bank of which he is an officer or employee, except by compliance with the provisions of that statute. The discount of a note of the character stated would, in effect, be the making of a loan or the borrowing of money from the bank.

OPINIONS TO GREATER UNIVERSITY

"GREATER UNIVERSITY"; WORKMEN'S COMPENSATION ACT; STATE ACTS AS SELF-INSURER

30 September 1946

I acknowledge receipt of your letter in which you state that the University of North Carolina has entered into an agreement with the Federal Public Housing Authority, whereby 357 housing units for the use of veterans have been located on University property in Chapel Hill; and out of the rentals derived from the units will be paid the operation expenses of the units, and the employees will be solely State employees. You further state that any profits derived from the rentals will be turned over to the Federal Government, and if any deficit occurs, the University will have to meet the same.

You inquire as to whether or not workmen's compensation insurance coverage may be purchased for employees engaged in work with the housing units in view of the fact that insurance premiums can be considered as a part of the operating expenses.

I am enclosing herewith a copy of a letter which I wrote you in July, 1943, on this subject which expresses the opinion of this office. However, if it can be definitely ascertained that there will be sufficient profit from the operation of the units to pay insurance premiums, I can see no objection to the University's buying such coverage. But from your letter, it appears that it will be impossible to determine whether there will be a profit until the end of the agreement between the University and the Federal Public Housing Authority.

SOIL CONSERVATION DISTRICTS; ELECTION AND TERM OF OFFICE OF DISTRICT SUPERVISORS

24 October 1946

In conference in this office this morning you referred to Sections 6 and 7 of Chapter 393, Public Laws of 1937, and requested an opinion as to the length of the terms of office of the District Supervisors of Soil Conservation Districts. Section 6 of the Act provides for the election by qualified voters of the district of three District Supervisors. Section 5F of the Act provides that the State Soil Conservation Committee shall appoint two supervisors after an election has been held and the district has been approved by the voters of the district to be incorporated. Section 7 of the Act provides that the governing body of the district shall consist of five supervisors which includes, of course, the two appointed by the State Committee and the three elected by the voters of the district.

With respect to the terms of office of these supervisors reference is made to the following excerpts from Section 7:

"The term of office of each supervisor shall be three years, except that the supervisors who are first appointed (by the State Committee) shall be designated to serve for terms of one and two years, respec-

tively, from the date of their appointment. A supervisor shall hold office until his successor has been elected or appointed and has qualified."

It appears from the language of the above quoted portion of the statute that the term of office for all five supervisors shall be three years, and that the "one and two year" provision has application only to the terms of the first two supervisors appointed by the State Committee upon the organization of the district. It is thought that thereafter the term of office of the two appointed by the State Committee shall be for three years from and after the expiration of the terms to which they were first appointed.

TAXABILITY OF FUNDS COLLECTED BY UNIVERSITY FROM STUDENTS FOR
MATRICULATION FEES UNDER INTERNAL REVENUE CODE,
SECTION 1700 (A)

13 November 1946

I have received and read with care your letter of October 19, and a letter from Mr. C. H. Robertson, Collector, by T. F. Kelly, Chief, Miscellaneous Tax Division, addressed to Mr. R. A. Fetzer of the Athletic Council, University of North Carolina, Chapel Hill, North Carolina, under date of September 25. In this letter from Mr. Robertson there was enclosed a copy of the Collector's Mimeograph No. 5843, which I have read very carefully.

In your letter of October 19 you have, with considerable detail, given me a statement of the purpose of the athletic program and the history of the athletic fee which is collected from students matriculating at the University of North Carolina at Chapel Hill.

In your letter you state that the right of the Federal Government to require the University to collect the Federal admissions tax on all tickets sold has never been questioned but that this is the first time that the Internal Revenue Department has indicated that it considers student fees in the taxable category and that, in the opinion of the University administration, the fourth paragraph of Mimeograph No. 5843 describes the situation at the University of North Carolina, which paragraph guarantees the exemption of student fees from the Federal tax, and you quote this paragraph as follows:

"Students admitted to affairs held at, or conducted by, the school which they attend, and students of schools competing in any athletic game or tournament, regardless of where held, are not admitted 'under circumstances under which' other persons are admitted and if admitted free are not liable for tax or if admitted at reduced rates are liable for tax on the reduced price, except that an admission charge of less than 10 cents for a child under twelve years of age is not subject to tax."

I will not attempt to quote in full your complete explanation of the history, objects and purposes of collection of the matriculation fee from students, which is used by the University in partial support of the physical education program maintained by the University under the direction of the Department of Physical Education and Athletics. In your letter you state that it is the opinion of the University administration that the history of this matriculation fee indicates very clearly that no part of it was

ever intended to apply toward student admissions to athletic events, and that it has always been considered that the University students were admitted to the events free because they were students; that they have been given membership cards or books entirely for the purpose of identification.

You request my opinion as to the liability of the University for the payment of any Federal admissions tax on any part of the matriculation fees collected under the circumstances fully detailed in your letter.

In the letter from Mr. Robertson under date of September 25, your attention is directed to the fact that Mimeograph No. 5843, as well as Mimeograph No. 5289, dated November 22, 1941, states that since the Revenue Act of 1941 amended the Federal admissions tax law, the amounts paid for student athletic tickets and student activity tickets, covering admissions to athletic games or other affairs of the school, are subject to the Federal admission tax at the rate of one cent for each five cents or major fraction thereof.

Under the facts as stated by you, no amounts are paid for student athletic tickets and student activity tickets and, therefore, this provision of the Mimeograph would have no application to your situation, in my opinion.

In the booklet which you furnish me, issued by the Department of Physical Education and Athletics at Chapel Hill, the following statement is made on page 27:

"A student athletic passbook, entitling the holder to admission to all regularly scheduled home athletic events, is available to each student who pays the University matriculation fee. This book should be secured each quarter at registration in the registration check-out lines. The passbook is not transferable, and will not be replaced if lost."

It is obvious to me, from a study of the whole program and the history of the athletic fee of the University at Chapel Hill, that it was never proposed by the University to charge students attending the University any fee whatever for attendance upon the athletic events in which the University participates at Chapel Hill. They pay exactly the same matriculation fee, whether or not they attend any athletic events and no deduction is made because they fail to use the passbooks which are furnished them for admission to these events. The facts stated by you show that the matriculation athletic fee paid by the students is inadequate to support the cost of other athletic activities conducted by the Department of Physical Education and Athletics at the University, and that the funds provided by the matriculation athletic fees are utilized and are inadequate for this purpose.

It is, therefore, my opinion that the tax levied by Section 1700 (a) of the Federal Internal Revenue Code, as amended by Section 541 of the Federal Revenue Act of 1941, and further amended by Section 302 of the Federal Revenue Act of 1943, imposing a tax of one cent for each five cents, or major fraction thereof, of the amount paid for admissions to any place, including admissions for a season ticket or subscription, would not be applicable to any part of the matriculation fees collected by you from students entering the University. This application and construction of law has been followed since its enactment and to depart from it would be contrary to the interpretation of this office and, as I am informed, the Federal officials up until the present time.

INTERNATIONAL ¼-INCH LOG RULE; SENATE BILL NO. 128, 1947

27 May 1947

I have your letter of May 26, enclosing a copy of Senate Bill No. 128 and requesting an interpretation of it. The pertinent part of the Act reads as follows:

"Section 1. The standard rule for determining the number of board feet in a tree or log shall be the so-called 'International ¼-Inch Log Rule.' None of the provisions of this section shall apply to contracts entered into prior to the ratification of this Act, nor to the measure of damages in any action in tort. This Act shall not prevent the buyer and the seller from agreeing that some other Log Rule shall be used to determine the number of board feet in trees or logs covered by the contract between them."

Under this Act, if a contract is made for the sale of a tree or logs by board feet measurement and no measurement or log scale is provided in the contract, the standard adopted by this Act would be applicable in the measurement of the logs. If the contract fails to mention the rule by which the logs are to be measured, the International ¼-Inch Log Rule adopted by this Act as a standard rule would be applied.

Under the statute, the section would not apply to contracts entered into prior to the ratification of this Act, nor to the measure of damages in any action in tort.

This would mean, apparently, that if a suit was instituted for trespass for cutting and removing timber or trees, in assessing the damages for the value of the timber cut, the rule would not be applicable.

The statute also provides that the Act does not prevent the buyer and seller from agreeing that some other log rule can be used. As you state in your letter, this means that by contract the buyer and seller could adopt some other rule of measurement and the Act, therefore, does not have the same prohibitions as applied in other standards, such as the bushel and pound which, under the law, are required to be used in buying and selling articles measured by the bushel or pound.

The adoption of the International ¼-Inch Log Rule does, however, mean more than you state, to the effect that it thereby gives the seller an opportunity for arguing a little more strongly for its use. It is the rule which would be applicable as stated above.

UNIVERSITY OF NORTH CAROLINA; TUITION; RESIDENT AND
NON-RESIDENT STUDENTS

15 October 1947

I received your letter of October 14 enclosing a letter to you from Dr. Raymond Adams with a copy of his affidavit and a memorandum from the American Embassy, London, England, all with reference to the tuition at the University of Miss Elizabeth Thomas who is a British citizen, temporarily in the United States for the purpose of attending as a student at the University of North Carolina.

I do not have the rules and regulations adopted by the Board of Trustees with reference to the payment of tuition by resident and non-resident students. There is nothing, however, in this file to indicate that Miss Thomas is a resident of the State of North Carolina or intends to become such, although her attendance at the University of North Carolina as a student is sponsored by Dr. Adams. In the absence of some other showing, it seems to me that she would be required to pay the tuition as a non-resident of the State.

UNIVERSITY OF NORTH CAROLINA; TUITION; RESIDENT AND
NON-RESIDENT STUDENTS

21 October 1947

I received your notation on my letter of October 15 with reference to the tuition of Miss Elizabeth Thomas. I note that Dr. Adams thinks he should be considered "in loco parentis" in this matter as he is responsible for the person and expenses of his ward.

The University Catalogue, on page 88, which you sent me and to which you directed my attention, provides that the residence of a minor is that of his parents or guardian. I understand that the parents of Miss Thomas are British subjects, living in England. The fact that Dr. Adams has agreed to pay her expenses while attending the University, I regret to say, in my opinion, would not entitle her to resident tuition.

The construction of the provisions of the Catalogue of the University is, however, primarily a matter for the Admissions authorities of the University and if they entertain a different view on this subject, I would not wish to bind them with any opinion which I express about it.

UNIVERSITY OF NORTH CAROLINA; CHAPTER 1070, SESSION LAWS OF 1947;
ADOPTION OF TRAFFIC REGULATIONS ON UNIVERSITY CAMPUS

3 November 1947

The questions raised in your letter of the 31st of October, 1947, are answered in the order stated:

(1) It is thought that the Trustees have authority to establish one or more parking areas on the campus for the exclusive use of faculty, administrative employees, and students who can demonstrate a need for such a priority under the provisions of the above Act.

(2) It is not thought that a valid regulation could be passed to prohibit students who live within walking distance of the campus from parking their cars on the campus between the hours of 8:00 A.M. and 5:00 P.M.

(3) No reason is seen why the University Trustees may not establish a regulation prohibiting students at the University from possessing and operating automobiles on the campus of the University of North Carolina. It is thought that perhaps a reasonable exception to this prohibition might be valid so as to permit disabled students, commuters, etc., to own and operate motor vehicles.

(4) It is thought that the 1947 Act would authorize the Trustees to establish parking lots in the vicinity of the various dormitories for the sole use of students who live in such dormitories.

Replying to the last paragraph of your letter, it is thought that the provisions of G. S. 116-10 would authorize the Trustees to absolutely prohibit the possession and operation of automobiles by students on the campus of the University.

FIRE INSURANCE; STATE PROPERTY; TRUST FUNDS; REPLACEMENT OF
DAMAGED OR DESTROYED PROPERTY

18 December 1947

I received your letter of December 16 with reference to the fire insurance on trust fund properties held by the University. You state that the legal title to the properties are held in the corporate name of the University of North Carolina but the net income from the properties goes into the respective trust funds for the uses and purposes set out in the indentures.

You refer to an opinion of this office referred to by the Commissioner of Insurance in a letter to you of September 22, 1947, in which we held that properties owned by certain trust funds are covered by the State Property Fire Insurance Fund. You quote Mr. Hodges' letter as stating that the State Property Fire Insurance Fund covers up to 50% of the value, or the same as the insurance carried under the schedule, and quote the opinion of Mr. Hodges that under existing laws, additional fire insurance cannot be carried on properties covered by the State Property Fire Insurance Fund.

You illustrate the problem confronting you by a statement as to the insurance on the Carolina Inn, which is carried at \$125,000.00 for the building and \$50,000.00 for the contents, but which building you state could not be replaced for three or four times the amount of the insurance carried. You state that if the State Property Fire Insurance Fund cannot replace the building in case it is destroyed, it would appear advisable to permit the University to carry additional fire insurance on this property and all other trust fund properties which are not fully covered. You ask for my opinion and advice.

The 1945 Act providing that the State should become a self-insurer, which is now Article 21 of the General Statutes, provides in G. S. 58-189 that upon the expiration of all existing policies of fire insurance upon State-owned buildings, fixtures, furniture and equipment therein, including all such property the title to which may be in any State department, institution or agency, the State of North Carolina cannot re-insure any of such properties. The Act provides for the creation of a State Property Fire Insurance Fund, to be made up from the unexpended appropriations for fire insurance premiums and such appropriations as shall be made biennially as provided in G. S. 58-190. This section provides that the estimate for the appropriations will be based upon the setting up of adequate reserves to provide a fund sufficient to protect the State, its departments, institutions and agencies, from loss or damage to any of said properties, up to fifty per centum of the value thereof.

G. S. 58-191, however, provides the method upon which fire losses will be handled and this section provides as follows:

"In case of total loss of any property of any state institution or partial loss thereof or the loss or damage of any other aforesaid state-owned property, the commissioner of insurance is authorized, empowered and directed to determine the amount of the loss and to certify the amount of loss to the department or institution concerned, to the budget bureau and to the governor and council of state. The governor and council of state may authorize transfers from the 'state property fire insurance fund' to the state agency having suffered a fire damage in such amount as they may consider necessary to restore the loss sustained, and in the event there is not sufficient sum in said state property fire insurance fund, the governor and council of state may supplement said fund from the contingency and emergency fund, and if there is not a sufficient amount therein, then from the state postwar reserve fund. Such funds as shall be allocated from such reserve fund shall be paid therefrom upon warrant of the state auditor."

As the title to the property to which you refer is in the University of North Carolina, it is included within the self-insurance provisions of the 1945 Act above referred to, and the State, as provided in G. S. 58-191, becomes 100% insurer of its own property, as it authorizes the Governor and Council of State to provide the amount they may consider necessary to restore the loss sustained.

I am sending a copy of this letter to Honorable William P. Hodges, Commissioner of Insurance. I assume that in estimating his appropriations as provided in G. S. 58-190, he includes the insurable property the title to which is in the University but which is referred to you as trust fund property. Whether or not this is done, however, the payment of a loss is regulated by the provisions of G. S. 58-19, as to all property, the title to which is in a State institution.

CHAPTER 1070, SESSION LAWS OF 1947; MOTOR VEHICLES; USE OF STICKERS
ON WINDSHIELD AND WINDOWS; TRUSTEES OF THE UNIVERSITY;
AUTHORITY TO ADOPT ORDINANCES

30 January 1948

Very careful consideration has been given to your letter of the 29th of January, 1948, with respect to the resolution recently adopted by the University trustees relating to campus traffic and parking regulations.

I agree with your conclusion that the resolution set out in your letter could not be enforced by legal action and that the only solution to the problem would be by administrative action by the University.

I do not think that the 1947 Act nor the general power of the University trustees to enact ordinances is sufficiently broad to permit the trustees to pass a valid ordinance with respect to requiring stickers to be placed on the windshields of student-owned automobiles so as to exempt such practice from the provisions of G. S. 120-127 (a). If some sticker could be devised which is transparent, they could, in my opinion, be legally attached to such windshields without violating the law in this respect.

Under the law as it is now written, it is the opinion of this office that the use of decals on the windshields of student-owned vehicles would be contrary to G. S. 120-127 (a).

UNIVERSITY OF NORTH CAROLINA; PURCHASE OF MILK EXEMPT FROM
PURCHASE AND CONTRACT LAW

30 March 1948

I received your letter of March 26 and read with interest your statement as to the purchase by the University at Chapel Hill of milk for the use of the institution. You raise the question as to whether or not the purchase of milk by the University is subject to the provisions of the law regulating purchases by State agencies.

G. S. 143-54 provides that, unless otherwise ordered by the Director of Purchase and Contract with the approval of the Advisory Budget Commission, the purchase of supplies, materials and equipment through the Director of Purchase and Contract shall not be mandatory in the several instances mentioned in the statute, including the following: "perishable articles and such as fresh vegetables, fresh fish, fresh meat, eggs and milk: Provided, that no other article shall be considered perishable within the meaning of this clause unless so classified by the Director of Purchase and Contract with the approval of the Advisory Budget Commission."

This statute further provides that all purchases of the exempted articles made directly by the departments, institutions and agencies of the State Government shall, wherever possible, be based on at least three competitive bids.

The statute, therefore, does require that bids be taken even though the article is purchased by the institution, where it is possible to do so. Whether or not it is possible to secure competitive bids on the type of milk and character of service which the University requires in the providing of the milk, may be a very difficult question and, in case of doubt, I assume that the decision of the University officials would be controlling. It would be possible, I assume, to get some bids on the supply of milk for the University but whether or not it would be practical to secure the bids on the type of service and supply that you would need may be a much more difficult problem. According to the language of the statute, the question would turn upon whether or not this need of the institution could be supplied by competitive bidding rather than continuing the present contract.

I could not advise you categorically in reply to your inquiry, as I do not know whether it would be practical or feasible to obtain your supply of milk from competitive bidding, which is the rule to be applied in ordinary cases. As I recall, when the present contract was let you did advertise and receive bids based upon which the contract was made. I talked with Mr. Betts about this matter and he was of the very definite impression that, since there are so many people interested in bidding on the contract for furnishing milk for the University, it will be better in this instance to advertise as you did before for competitive bids. The statute requires that whenever an order or contract is awarded by an institution, a copy of such order or contract, together with a record of the competitive bids upon which it was based, shall be forwarded to the Director of Purchase and Contract. This, of course, would have to be done.

UNIVERSITY OF NORTH CAROLINA; TAXATION OF CAROLINA INN UNDER
SCHEDULE B OF THE REVENUE ACT

22 June 1948

I received your letter of June 19, raising a question as to whether or not the Carolina Inn is subject to the license taxes imposed on hotels under G. S. 105-60, G. S. 105-61 and G. S. 105-62.

You state that this property was deeded to the University of North Carolina by Mr. John Sprunt Hill and that all of the net profits from the Inn go to support the University Library and that it is operated in the same manner as other University property.

You point out that the Inn does not advertise for business and does not cater to travelers or commercial guests but does accept such guests when rooms are available, its main purpose, however, being to provide a place for entertainment of visitors to the University and those attending the various conferences organized under the auspices of the University, as well as performing other functions incidental to the University life.

It is my opinion that the University is exempt from the license tax imposed by the sections of the Revenue Act mentioned on its operation of the Carolina Inn under the circumstances detailed by you, as the imposition of the tax would be, in effect, taxing the business of the State itself, the University being an agency of the State.

OPINIONS TO EMPLOYMENT SECURITY COMMISSION

STATE AUDITOR; STATE WARRANT; STATE WARRANT LOST OR HELD BEYOND
EXPIRATION OF SIXTY DAYS; ISSUANCE OF NEW WARRANT

9 July 1946

In your letter of July 1, 1946, you ask this office to issue an interpretation or ruling on certain questions submitted by you, pertaining to the issuance of new State warrants, as follows:

"1. An Unemployment Compensation check is issued to a claimant for a week of unemployment. The claimant loses or misplaces the check before it is cashed.

"2. The claimant cashes the check and the person or firm cashing the check loses or misplaces the check, but can locate the claimant.

"3. The claimant cashes the check and the person who cashes the check holds it beyond the sixty days validity period or loses the check and cannot locate the claimant."

As to your first question which presents the situation where a claimant loses or misplaces a benefit check before it is cashed, I do not find any statute that specifically covers this situation. I am advised, however, by the Auditor's Office that it has been the custom in such cases to issue a stop-payment order and then to issue a new or duplicate warrant to the original payee or in your case such a person would be designated as the claimant. I see no reason why this new warrant or duplicate voucher cannot be issued before the sixty-day limitation period, provided in Section 147-59 of the General Statutes, has expired. It would in my opinion, however, be much safer for your agency to wait until the sixty-day limitation period has expired, then cause a stop-payment notice to be entered and a new or duplicate warrant to be issued. The reason that I think you should wait until the sixty-day limitation period has expired is because it might be possible under some circumstances that the original warrant is actually not lost but is in the hands of some other party; if you should issue a new warrant before the sixty-day period has expired, it is entirely possible that two State warrants could be circulating in the State where only one benefit week is the basis for the issuance. True, you have a stop-payment notice on the first one, but it might cause a great deal of trouble; and it seems to me that you would be in a much better position if you only issued a new warrant after the limitation period had expired.

Your second question deals with the situation where a benefit check has been issued to the claimant and he negotiates or transfers the warrant to a merchant or some other person. After the transferee receives the warrant in due course of business, he loses or misplaces the check but can locate the claimant. Bearing in mind what I have said above about the sixty-day limitation period, I see no reason why you cannot stop payment on the first warrant, issue a new warrant made out to the claimant as payee and send this new warrant to the transferee or the person who received the original

warrant in due course of business, and he can then secure the endorsement of the claimant and in no case should you issue the new warrant to the transferee or endorsee.

Your third question presents the situation where the claimant cashes the benefit check or State warrant and the person or firm who cashes the check holds it beyond the sixty days validity period or loses the check and cannot locate the claimant. In 1945 the General Assembly of North Carolina revised the statute dealing with barred warrants so that the same now reads as follows:

"All warrants drawn by the state auditor or any state department, or agency, bureau, or commission on the treasurer, shall bear, and there shall be printed upon the face thereof in plain type so as to be easily read, the following words, to-wit: 'This warrant will not be paid if presented to the treasurer after the expiration of sixty (60) days from the date hereof'; and the state treasurer is hereby prohibited from paying any warrant drawn by the state auditor or any state department, or agency, bureau, or commission, unless the same shall be presented within sixty (60) days from the date of such warrant."

At the same Session of the General Assembly, the State also revised its law dealing with the issuance of new warrants in lieu of barred ones, and this section reads as follows:

"Any person, firm, or corporation holding a warrant drawn by the State auditor which cannot be paid because of the provisions of §§147-59 and 147-61 may present the same to the issuing state officer, department, agency, bureau, or commission, and upon satisfactory proof that such person, firm, or corporation is the owner thereof and is entitled to have and receive the proceeds of such warrant, and that the obligation for which the warrant is drawn is a subsisting obligation against the State of North Carolina, may surrender said warrant to the issuing state officer, department, agency, bureau, or commission, whereupon the issuing state officer, department, agency, bureau, or commission is authorized and empowered to issue another warrant for a like amount in lieu thereof."

In view of the provisions of the above quoted statutes as related to your third question, I am of the opinion that you can issue a new warrant or duplicate warrant to the endorsee or transferee holding the original barred warrant provided the original warrant is surrendered by the endorsee or transferee to your agency. If the transferee or endorsee of the original warrant misplaces the warrant or loses it and the sixty-day period has expired, you can issue a new warrant payable to the original payee and send it to the original payee and let him endorse it and deliver it to the last transferee or endorsee that held the original warrant or you can issue the new warrant to the original payee and send it to the endorsee or transferee and let him secure the endorsement of the claimant or payee. I am advised that it is not the custom in such cases where the voucher is lost and the claimant or original payee cannot be located to issue the duplicate warrant or new warrant to the endorsee or transferee. In cases of lost warrants or checks held by endorsees or transferees, you can only issue the new warrant to the original claimant or payee. It is only in cases where the endorsee or transferee holds or has in his possession the original warrant and can present or surrender same to your agency that you can issue new warrants direct to such transferee or endorsee.

UNEMPLOYMENT COMPENSATION; STATE DEPARTMENT OF ARCHIVES AND
HISTORY; DESTRUCTION OF UNEMPLOYMENT COMMISSION'S VOUCHERS
OR CHECKS WHICH HAVE NO SIGNIFICANCE OR VALUE

27 August 1946

Reference is made to your letter of August 23, 1946 and copies of memoranda received with your letter.

It appears that your commission has on hand a large number of cancelled checks or vouchers originally issued by the Unemployment Compensation Commission and which checks or vouchers have been paid and cancelled. These checks and vouchers have already passed through the auditor's office, the treasurer's office and have been returned to your commission. These checks or vouchers were originally issued for the payment of unemployment compensation benefits and for the payment of other obligations of the commission which were incurred within the scope of its duties and powers. From the supporting data accompanying your letter it appears that since the agency began paying unemployment compensation benefits, 4,700,000 have been issued. The file also shows that your agency has requested Mr. John B. Bray, Superintendent of Public Buildings and Grounds, to provide the agency storage space for these cancelled checks and vouchers. At the time the request was made to Mr. Bray, the agency needed storage space for about 4,000,000 checks. Mr. Bray advised you over the telephone that there was no storage space available. On August 14, 1946, an agent of the commission wrote Dr. Christopher Crittenden, Secretary of the North Carolina Department of Archives and History, a letter requesting authorization of the Historical Commission to destroy these cancelled checks. Samples of these checks were copied in the letter to Dr. Crittenden. On August 15, 1946 Dr. Crittenden, by letter, informed your agency that the Historical Commission would authorize the disposal of the checks provided the matter was cleared with the office of the Attorney General. It appears that you keep in your files an Employee Benefit Ledger to which all checks in question are posted. At this time you would like to destroy approximately 2,750,000 cancelled checks.

You would like to know if it is proper to have these checks destroyed since they have already served their purposes and there is no storage space available.

Under our law the authority for destroying State records, books, and papers which have no significance, importance or value is vested with the Council of State acting upon the advice and recommendation of the custodian in charge of the records and papers and the further advice and recommendation of the State Department of Archives and History. Section 121-4 of the General Statutes of North Carolina, among other things, provides as follows:

"Provided, that any state archives, records, books, documents, original papers, newspaper files, printed books, or manuscripts which have no significance, importance, or value, may, upon the advice and recommendation of the custodian in charge of said archives, records, books, documents, original papers, newspaper files, printed books, and manuscripts, and upon the further advice and recommendation of the state department of archives and history, be authorized by the council of state of the state of North Carolina to be destroyed or otherwise disposed of;"

I am of the opinion, therefore, that if you make your recommendation as to the destruction of these checks to the State Department of Archives and History and the State Department of Archives and History approves your recommendation, then both you and the Department of Archives and History should submit your advice and recommendation to the Council of State of North Carolina and request an order from the Council of State for the destruction of these checks. By following the method set forth in the above quoted excerpt, it is my opinion that you have a right upon an order of the Council of State to destroy these cancelled checks. The language in the above quoted excerpt is broad enough to include the cancelled checks described in your letter; and since these checks can no longer serve any useful purpose, I feel sure the Council of State will grant you such an order. Irrespective of the result, we are of the opinion that we have given you the proper method of procedure as set forth above. I assume that any check submitted to the Council of State for an order of destruction will have been retained by you a sufficient length of time for any examination or verification that may be made by any State Auditor or Federal Auditor.

EMPLOYMENT SERVICE DIVISION; TRANSFER OF THE OPERATION OF STATE AND
LOCAL PUBLIC EMPLOYMENT OFFICE FACILITIES AND PROPERTIES BY THE
SECRETARY OF LABOR TO STATE AGENCY; PERSONNEL TRANSFER PROGRAM
REQUIRED BY PUBLIC LAW 549-79TH CONGRESS, 2ND SESSION;
METHOD OR BASIS FOR ACQUIRING ELIGIBILITY FOR
APPOINTMENT UNDER THE STATE MERIT SYSTEM

14 October 1946

From your letter and memoranda furnished therewith, it appears that in the year of 1942, pursuant to an executive order of the President of the United States and also pursuant to a contract executed by the Unemployment Compensation Commission, Director of the Employment Service Division and other proper officials, the Employment Service Division of the Unemployment Compensation Commission of this State was transferred to the Federal Government because of the emergency created by the war. It was contemplated at all times that the personnel, facilities and property so transferred would be returned to the various states after the war emergency ceased to exist; and the states would thus resume the operation of the various state and local offices and other employment service functions which in our State are a coordinate part or division of the Unemployment Compensation Commission. Effective as of July 26, 1946 the Congress of the United States passed an act which is now designated as Public Law 549 — 79th Congress, Chapter 672, 2nd Session, which is the Labor-Federal Security Agency Appropriation Act for the Fiscal Year ending June 30, 1947. Among other things, this Act provides that on November 15, 1946 the Secretary of Labor shall transfer to the proper state agency the operation of State and local public employment office facilities and properties as therein provided; and for the convenience of other

State officials who may have reason to read this letter, I quote extensively from Public Law 549 of the 2nd Session of the 79th Congress, as follows:

"On November 15, 1946, the Secretary of Labor shall transfer, to the State agency in each State designated under section 4 of the Act of Congress approved June 6, 1933, as amended, as the agency to administer the State-wide system of public employment offices in co-operation with the United States Employment Service under said Act, the operation of State and local public employment office facilities and properties which were transferred by such State to the Federal Government in 1942 to promote the national war effort. The Secretary of Labor shall, on request of the State agency, also provide for the transfer and assignment to such State, without reimbursement therefor, of any other public employment office facilities and properties within such State, including records, files, and office equipment: Provided, That as a condition to such transfer and assignment of Federal properties, the Secretary may require the recipient State to waive any claim which may then exist or thereafter arise out of the use made by the Federal Government of, or for the loss of or damage to, property and facilities transferred to the Federal Government as hereinabove described.

"The Secretary of Labor may withhold or deny certifications of funds for a State system of public employment offices unless he finds that the State—

"(1) (a) has made provision for the transfer to and retention in the State-wide system of public employment offices of employees of the Federal Government who (on the effective date of this Act) were employed in State or local employment service functions in such State, in the positions occupied by them under the Federal service or in reasonably comparable positions, except that individuals so transferred may be separated or terminated for good cause as determined in individual cases under the applicable State merit system, or separated or terminated under the applicable State merit system by reason of reductions in force found necessary in the interests of efficient operations, and may be separated (A) if they have failed to acquire eligibility to be certified for appointment superior to that of any war veteran competing for the same appointment in the State-wide system of public employment offices under the State merit system in the positions occupied by them under the Federal service or in reasonably comparable positions, after having been given a reasonable opportunity to acquire such eligibility, or (B) if the Secretary has determined that it is impossible for them to be given an opportunity to acquire such eligibility because of State constitutional or statutory provisions in force on the effective date of this Act; and (b) has made provision for the extension to employees of the Federal Government who left employment-service position in such State in order to perform training and service in the land or naval forces of the United States or service in the merchant marine as defined in Public Law Numbered 87, Seventy-eight Congress, of the same employment rights and privileges as those provided for Federal employees transferring to State employment in accordance with the provisions of this paragraph; or

"(2) has requested the detail of such employees to the State agency under the following provisions: So much of the funds appropriated for State-wide systems of public employment offices as may be necessary shall be available to the Secretary of Labor, in lieu of any portion of the grant to the State, for the payment of compensation (under the salary scales applicable to such employees prior to the effective date of this Act) to employees of the United States Employment Service in the Department of Labor, who, upon the request of the State, and for the purpose of permitting continuity in their employment pend-

ing an opportunity to acquire eligibility for State employment in accordance with clause (1) (a) of this paragraph, may be detailed by the Secretary of Labor to the State agency for service in the state-wide system of public employment offices."

From the above quoted, it will be seen that the Secretary of Labor has the authority to withhold or deny certifications of funds for a State system of public employment offices unless the State in question makes provision for the transfer to and retention in the State-wide system of public employment offices of employees of the Federal Government who on the effective date of the above quoted Act were employed in State or local employment service functions in such State in the positions occupied by them under the Federal Service or in reasonably comparable positions. it is in essence required that such employees shall be given an opportunity to acquire eligibility or status under the Merit System of this State for the positions now occupied by them in the Federal Service or for reasonably comparable positions. Such a State system or method providing opportunity for such employees to acquire eligibility for appointments under the State Merit System must conform to the primary essentials or requirements expressed in the above quoted Federal statute.

You have transmitted with your letter certain mimeographed papers entitled "Program and Procedures for the Transfer of USES Personnel to the State-Wide System of Public Employment Offices." I assume that these procedures have been furnished to your agency by the proper department of the Federal Government as a guide in preparing your transfer program. You have also transmitted with your letter certain papers entitled "Merit System Plan to Cover Eligibility Phases of Employment Service Personnel Transfer Program." This document is signed by the Honorable Henry E. Kendall, Chairman of the Unemployment Compensation Commission of North Carolina and Honorable Frank T. de Vyver, Merit System Supervisor. If I understand you correctly, the last above designated document is designed to furnish a method or establish a definite procedural system by means of which employees of the Federal Government who were on the effective date of the Act above mentioned employed in State or local employment service functions in the State of North Carolina may have an opportunity to acquire eligibility under or establish status with our State Merit System to the end that they may retain their employment in the positions occupied by them under the Federal Service or in reasonably comparable positions, in other words our appointing authority, the Unemployment Compensation Commission of North Carolina, may appoint these employees as eligible employees under our State Merit System. It is noted that this document defines "covered employee," "clerical employees", and "reasonably comparable positions." The document further classifies the different types of employees that may be returned to the State agency and may be eligible for appointment or reinstatement. It is further provided that certain employees who have not acquired eligibility for permanent or probationary appointments because such employees do not appear on a current Merit System register of this State, or for other reasons, may acquire eligibility by means of competitive promotional examinations or from an open competitive examination. It is not necessary to go into all the details of the plan.

You state that the document that you have designated as Document No. 4, entitled "Merit System Plan to Cover Eligibility Phases of Employment Service Personnel Transfer Program," is only a part or portion of the transfer program and that there are other procedures to be worked out and submitted to the proper authorities. For example, it is necessary to work out and have approved a classification and compensation plan for these employees; and as recited in the document, such classification and compensation plan is subject to the approval of the State Budget Bureau. You further state that your agency cannot at the present time submit the full program to the Federal authorities for approval; and it is thought advisable to submit this program in two parts. You propose to submit first your plan or system by which these employees may have an opportunity to acquire eligibility or status under the State Merit System, which proposal is embodied in what you have designated as Document No. 4 and which I have referred to above.

You submit to this office two questions as follows:

(1) Are there any provisions of the State law which would prevent the submission of this Personnel Transfer Program or plan in two parts as described in your letter?

(2) You would like to know if the officials who have signed such document, that is the Chairman of the Unemployment Compensation Commission of North Carolina and the Supervisor of the Merit System Council of this State, have the authority to sign this document dealing with the method by which such employees may have an opportunity to acquire eligibility under the State Merit System for their present positions or reasonably comparable positions.

As to your first question, we see no reason why this Personnel Transfer Program cannot be submitted and approved in two parts. We know of no regulations, statutes or budgetary and personnel requirements of this State that would prohibit or prevent you from submitting this program of personnel transfer in two parts; and likewise, there are no regulations or laws of this State that prevent you from submitting the document entitled "Merit System Plan to Cover Eligibility Phases of Employment Service Personnel Transfer Program," which you have designated as No. 4, by itself and as a separate component part of the program. It is thought that most of the employees now performing employment service functions in the State of North Carolina as a part of the United States Employment Service System already appear on the registers of the State Merit System and will, therefore, have an opportunity to acquire eligibility by reason of their previously acquired status under our State Merit System. As to these employees, their status has long ago been acquired and approved by all necessary and proper officials of this State. In other words, they already meet the requirements of the System. As to the problems involved with those employees who do not fall within these categories and who must be given an opportunity to acquire eligibility or status by methods which represent a deviation from the State's Merit System plan as already established and already in operation, then in our opinion the Federal statute prevails and these so-called deviations automatically become a part of our State Merit System plan, law, and regulations by

virtue of the mandatory features of the Federal statute. Section 126-15 of the General Statutes of North Carolina, which is a part of the chapter establishing our Merit System Council, is as follows:

"Wherever the provisions of any law of the United States, or of any rule, order or regulation of any federal agency or authority, providing or administering federal funds for use in North Carolina, either directly or indirectly or as a grant-in-aid, or to be matched or otherwise, impose other or higher, civil service or merit standards or different classifications than are required by the provisions of this chapter, then the provisions of such laws, classifications, rules or regulations of the United States or any federal agency may be adopted by the council as rules and regulations of the council and shall govern the class of employment and employees affected thereby, anything in this chapter to the contrary notwithstanding."

It is likewise noted that the purpose of our Merit System Law is expressed in Section 126-17 of the General Statutes, as follows:

"It is the intent and purpose of this chapter to permit and require the agencies and departments affected hereby to comply with the rules and regulations of the Federal Social Security Board and such other federal agencies as may be charged with the administration of the Social Security Act, and the rules governing the expenditure of federal and state social security funds in the administration of said laws."

It is our opinion, therefore, that the program submitted by you, which is designated as Document No. 4 and represents the plan of this State by which these employees may acquire eligibility or status with the Merit System of this State for retention and appointment, is in accordance with our Merit System Law and the primary objectives of the Federal statute; and there are, therefore, no regulations, statutes or budgetary and personnel provisions of this State that prohibit or prevent you from submitting this phase or part of the Personnel Transfer Program as a separate unit or component part for approval subject to the submission of the balance of the program and the submission of a classification and compensation plan which may thereafter be approved by the proper State officials.

As to your second question under which you inquire if the Chairman of the Unemployment Compensation Commission and the Supervisor of the Merit System Council have authority under the laws of this State to sign the document in question, which is designed as No. 4 and which deals with the method or plan by which such employees may acquire eligibility, we are of the opinion that such officials do have the authority to sign this document and that such document so signed by them is binding upon the State of North Carolina and its agencies to the extent of the provisions therein expressed.

Under the laws of this State, the North Carolina State Employment Service is now a coordinate division of the Unemployment Compensation Commission. The provisions of the State law governing the North Carolina State Employment Service have now been incorporated into the chapter of our General Statutes dealing with Unemployment Compensation, and these statutes dealing with the employment service are grouped under Article 3 of Chapter 96 of the General Statutes of North Carolina

entitled "Unemployment Compensation." I quote a portion of Section 96-20 of the General Statutes of this State as follows:

"The employment service division of the Unemployment Compensation Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this article, . . . The commission is directed to appoint the director, other officers, and employees of the state employment service."

It is also provided by Subsection (b), Section 96-3 of the General Statutes, as follows:

"The commission shall establish two co-ordinate divisions: the North Carolina state employment service division, created pursuant to §96-20, and the unemployment compensation division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so far as the commission may find that such separation is impracticable."

The Unemployment Compensation Commission is charged with the overall administration of all of the functions grouped under Chapter 96 of the General Statutes, which includes the employment service division as well as the unemployment compensation division. It is provided in Section 96-4 of the General Statutes as follows:

"It shall be the duty of the commission to administer this chapter. . . . The chairman of said commission shall, except as otherwise provided by the commission, be vested with all authority of the commission. . . ."

We could perhaps quote other statutes and provisions, but we are well satisfied; and it is our opinion that under the law of this State, the Chairman of the Unemployment Compensation Commission has the authority to sign the document designated by you as No. 4 and which is entitled "Merit System Plan to Cover Eligibility Phases of Employment Service Personnel Transfer Program."

As to the Merit System Supervisor who has likewise signed this same document, we personally know that the Merit System Council of North Carolina has authorized the Honorable Frank T. de Vyver, Merit System Supervisor, to sign this document. We are of the opinion that Dr. de Vyver has been properly authorized to sign the document and that his signature thereto is binding upon the Merit System Council of this State and upon the State of North Carolina as to the provisions therein expressed.

To summarize: we are of the opinion that the document before us designated as "Merit System Plan to Cover Eligibility Phases of Employment Service Personnel Transfer Program," and designated further as No. 4 has been properly signed by Honorable Henry E. Kendall, Chairman of the North Carolina Unemployment Compensation Commission and by the Honorable Frank T. de Vyver, Merit System Supervisor and that both of these officials have the authority under our State law and statutes to sign such document and have been properly authorized to sign such document. We

are further of the opinion that the signing of such document by these officials was binding upon their respective agencies and upon the State of North Carolina and upon the provisions therein expressed.

UNEMPLOYMENT COMPENSATION; EMPLOYMENT SERVICE DIVISION; RETURN OF NORTH CAROLINA EMPLOYMENT SERVICE TO STATE CONTROL PURSUANT TO PUBLIC LAW 549, 79TH CONGRESS, CHAPTER 672, 2ND SESSION; AGENCY OF NORTH CAROLINA AUTHORIZED TO SUBMIT PLAN OF OPERATION OF EMPLOYMENT SERVICE DIVISION PRIOR TO RETURN OF THE EMPLOYMENT SERVICE TO STATE CONTROL; AGENCIES OR OFFICIALS AUTHORIZED TO SIGN TRANSFER FORMS FOR THE RETURN OF PROPERTY LOANED TO THE FEDERAL GOVERNMENT AND AUTHORIZED TO SIGN WAIVERS BY THE STATE FOR ANY CLAIMS THAT MIGHT EXIST AGAINST THE FEDERAL GOVERNMENT FOR THE USE OF FACILITIES

23 October 1946

In your letter of October 9, 1946, you attach a document which you have marked as No. 1 and which contains the rules and regulations of the Secretary of Labor for the operation of the Employment Service Division of the Unemployment Compensation Commission after its return to State control. The second portion of this document deals with a plan of operation which must be submitted by the State of North Carolina prior to the return of the Employment Service Division in order to qualify for funds as provided for in the Wagner-Peyser Act. It is required by the Secretary of Labor of the United States that the letter transmitting such a plan of operation should bear the signature and title of the official or officials authorized under the State law to submit the plan of operation.

You would like to know if the Chairman of the Unemployment Compensation Commission can sign the letter of transmittal of such a plan as above referred to, and if the Unemployment Compensation Commission of North Carolina can be considered or deemed the agency for the purpose of submitting such a plan.

At the present time there is no Employment Service Division of the Unemployment Compensation Commission of North Carolina. The State statutes exist and are still in force that provide for such a division, but the facilities are not available and the functions are not being performed in behalf of the State because the Employment Service Division was loaned to the Federal Government by virtue of the executive order of the President of the United States and the agreement entered into between this State and the Federal officials transferring such division to the Federal Government. The Employment Service Division is a part of the Unemployment Service Division are a part of Chapter 96 of the General Statutes of North Carolina. Section 96-4 of the General Statutes of North Carolina makes it the duty of the Unemployment Compensation Commission to administer the whole chapter, which includes the statutes governing the Employment Service Division. The Unemployment Compensation Commission of North Carolina is responsible for the overall administration of the Employment Service Division. Under the provisions of Section 96-20 of the General Statutes, the Unemployment Compensation Commission of North

Carolina is the appointing authority for the director and other officers and employees of the Employment Service Division. It is true that under Section 96-20 of the General Statutes, there is a provision that the Director of the Employment Service is charged with the duty of cooperating with any officer or agency of the United States for the purpose of securing the benefits of the so-called Wagner-Peyser Act; but to my mind, this concerns the administration of the Division after the plans and policies have been adopted and approved by the Unemployment Compensation Commission. This simply designates a subordinate official of the Commission, the Director of the Employment Service, to look after this portion of the administration of the system in its dealings with the Federal Government under the Wagner-Peyser Act. It does not take from the Commission its over-all powers of administration and authority to adopt plans and submit plans which will subsequently be administered by the Director of the Employment Service Division in cooperation with the Federal Government under the Wagner-Peyser Act. Aside from the fact that under Public Law 549, 79th Congress, 2nd Session, the present employees of the Federal Government who were employed in State or local Employment Service functions will have a right to acquire eligibility for appointment, the situation stands on the same basis as if the Unemployment Compensation Commission of North Carolina were engaged in originally and for the first time organizing and setting up the Employment Service Division. To my mind, therefore, it is not necessary to appoint a Director of the Employment Service Division under State control for the purpose of submitting plans and adopting policies, since we are of the opinion that the Commission itself has that authority.

We are of the opinion, therefore, that the Chairman of the Unemployment Compensation Commission, Honorable Henry E. Kendall, has the authority to sign a letter of transmittal submitting such plan of operation under State control prior to the return of the Employment Service and for the purpose of qualifying for funds as provided for in the Wagner-Peyser Act. As you know, under Section 96-4 of the General Statutes the chairman is authorized to act in the absence of the Commission and is vested with all the authority of the Commission when it is not in session.

We are further of the opinion that the Unemployment Compensation Commission of North Carolina is authorized by our State statutes as the State agency to submit the plan above referred to and to administer the Employment Service of the State in accordance with the Act of June 6, 1933 (48 Stat., 113) as amended, and in accordance with Title IV of the Servicemen's Readjustment Act of 1944 as amended, and the pertinent provisions of the Labor-Federal Security Appropriation Act for the Fiscal Year ending June 30, 1946.

In the second portion of your letter, you refer to the fact that when the Employment Service Division of this State was transferred to the Federal Government, an agreement was made providing for the loan of State properties to the United States Employment Service. These properties are now to be returned to the State. There are three classes of properties, one of which is the property loaned by the State to the United States Employment Service; another is property purchased by the State and loaned to the United States Employment Service subsequent to the transfer on

January 1, 1942; and the third class is property and equipment purchased after January 1, 1942, by Federal procurement orders, which can be designated as property belonging to the United States Employment Service. Under Title 1, Public Law 549, 79th Congress, 2nd Session, it is provided as follows:

" . . . The Secretary of Labor shall, *on request of the State* agency, also provide for the transfer and assignment to such State, *without reimbursement therefor*, of any other public employment office facilities and properties within such State, including records, files, and office equipment: Provided, That as a condition to such transfer and assignment of Federal properties, the Secretary may require the recipient State to waive any claim which may then exist or thereafter arise out of the use made by the Federal Government of, or for the loss of or damage to, property and facilities transferred to the Federal Government as hereinabove described." (Italics ours).

The property facilities transferred under the agreement and which belong to the State will be returned under this Act; and according to the above quoted section, the Federal facilities and properties will be transferred and assigned to the State upon request of the State made to the Secretary of Labor providing that the recipient State waives any claim which may then exist or thereafter arise because of the use made by the Federal Government or because of any loss or damage to properties and facilities loaned to the Federal Government by the State.

You would like to know who has the right to sign the transfer forms for the return of both the property loaned to the Federal Government and what agency or officials would have the right, on behalf of the State of North Carolina, to waive any claims which might exist against the Federal Government by reason of the use of such facilities and properties loaned to the Government as above set forth.

Under our law, the Division of Purchase and Contract, which is established in the office of the Governor and is under the control of a Director of Purchase and Contract, has the authority to purchase and maintain all supplies and property used by agencies of the State of North Carolina. This Division also has the authority to dispose of all supplies, materials, and equipment which are surplus, obsolete or unused. We are of the opinion, therefore, that these properties which were loaned by the State to the Federal Government, so far as our State is concerned, were and are under the jurisdiction of the Division of Purchase and Contract. It is our opinion, therefore, that any and all transfer forms for the return of property loaned to the Federal Government and any and all forms whereby the State of North Carolina undertakes to waive any claims for damages or any claims which might arise whatsoever against the Federal Government as the same may then exist or may thereafter arise, should be executed by the Unemployment Compensation Commission of North Carolina or in the absence of a meeting of the Commission, by the Chairman of the Unemployment Compensation Commission of North Carolina; and in addition thereto, all such forms of transmittal and waivers of damage or claims, should be executed by the Director of the Division of Purchase and Contract of the State of North Carolina. When such transfer forms and when such forms of waiver pertaining to any claims which may now

exist against the Federal Government or may thereafter arise because of the use of such facilities, are signed by these two agencies or officials, then, in our opinion, such transfer forms and such waivers will be binding upon the State of North Carolina.

EMPLOYMENT SERVICE DIVISION; RETURN OF NORTH CAROLINA EMPLOYMENT SERVICE TO STATE CONTROL PURSUANT TO PUBLIC LAW 549, 79TH CONGRESS; CHAPTER 672, 2ND SESSION; AGENCY OF NORTH CAROLINA AUTHORIZED TO SUBMIT PLAN OF OPERATION OF EMPLOYMENT SERVICE DIVISION PRIOR TO RETURN OF THE EMPLOYMENT SERVICE TO STATE CONTROL; AGENCIES OR OFFICIALS AUTHORIZED TO SIGN TRANSFER FORMS FOR THE RETURN OF PROPERTY LOANED TO THE FEDERAL GOVERNMENT AND AUTHORIZED TO SIGN WAIVERS BY THE STATE FOR ANY CLAIMS THAT MIGHT EXIST AGAINST THE FEDERAL GOVERNMENT FOR THE USE OF FACILITIES

27 November 1946

You state that you have received a letter from Mr. Robert C. Goodwin relative to the subject matter shown in the above caption. You have also sent me certain excerpts from Mr. Goodwin's letter, and the substance of the matter is that Mr. Goodwin would like to have an opinion from the office of the Attorney General of North Carolina as to whether or not the Unemployment Compensation Commission of North Carolina has the authority to administer the plan of operation of the North Carolina State Employment Service in accordance with the Wagner-Peyser Act, as amended, Title IV of the Servicemen's Readjustment Act of 1944, as amended, and the Labor-Federal Security Appropriation Act, 1947 (Public Law 549, 79th Congress). You have also sent me a copy of the plan of operation referred to above, and you have especially called my attention to that portion of the plan designated as Sub-Title B-Labor Regulations, Chapter I- United States Employment Service, Department of Labor—Part 22. Reference is also made to Section 22.201 which deals with the request for an opinion from the Attorney General's office of this State as to the authority of the State agency to administer such a plan as above referred to.

As I have stated in previous letters, Chapter 96 of the General Statutes of North Carolina contains the laws of our State dealing with Unemployment Compensation. Article 2 of this chapter deals with the Unemployment Compensation Division, and Article 3 of this same chapter deals with the Employment Service Division of the Unemployment Compensation Commission. Under Section 96-20 of the General Statutes, the Unemployment Compensation Commission has authority to appoint the director, other officers, and employees of the State Employment Service. Under Section 96-4 of the General Statutes of North Carolina, the Unemployment Compensation Commission of North Carolina is vested with the power and duty to administer the whole chapter which includes Article 3 dealing with the Employment Service Division. It is true that under the provisions of Section 96-20, the statute specifically prescribes that the Director of the Employment Service Division was charged with the duty of cooperating with the appropriate agency of the United States to the end that this State may secure the benefits of the Wagner-Peyser Act.

This, however, is not in conflict of the over-all authority and responsibility of the Unemployment Compensation Commission to administer both programs, that of Unemployment Compensation as well as the operation of a system of employment offices with job-placement, etc., as carried on by the Employment Service Division.

I am of the opinion, therefore, and the Attorney General concurs in this opinion, that the Unemployment Compensation Commission of North Carolina has full power and authority to administer the plan of operation under the Wagner-Peyser Act which you have heretofore submitted to me and which I have examined, the same being designated as set forth above, all in accordance with the Wagner-Peyser Act, as amended, Title IV of the Servicemen's Readjustment Act of 1944, as amended, and the Labor-Federal Security Appropriation Act, 1947 (Public Law 549, 79th Congress).

UNEMPLOYMENT COMPENSATION LAW; SECTION 96-14(a) OF THE GENERAL STATUTES; VOLUNTARY OR INVOLUNTARY SEPARATION FROM WORK; MARRIED WOMEN WHO LEAVE THEIR WORK TO FOLLOW THEIR HUSBANDS TO NEW RESIDENCES

3 December 1946

In your letter you refer to Section 96-14(a) of the General Statutes which relates to the disqualification for benefits imposed by the Commission when it is determined by the Commission that an individual is unemployed because he or she left work voluntarily without good cause attributable to the employer.

You ask the following question as related to this statute:

"When a married woman follows her husband to a new place of residence, or a new domicile, where he has secured work and such place is too far removed for the woman to continue her work, should it be considered, in connection with the above-quoted section, that she involuntarily separated from her employment, or should it be considered that she voluntarily separated without good cause attributable to the employer, which is contemplated by the above section?"

You say that you would like for our opinion to be confined to the question as to whether such person voluntarily or involuntarily quit work and that you only ask for an opinion on a case where the husband has actually established a domicile or has actually secured permanent work in another locality. You state that you are at present holding that a woman who follows her husband around from place to place where he has temporary jobs, and when he has established no domicile, should be considered as having voluntarily quit her work without good cause attributable to the employer; however, you have held that where the husband has established a domicile or has secured permanent work and the wife quits her work to follow him that she involuntarily separates in order to follow her husband and, therefore, should not be disqualified from the receipts of benefits, assuming that she meets other eligibility requirements.

The language of the disqualification section is as follows:

"For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with re-

spect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount."

It would seem that unless a claimant leaves his or her work voluntarily, then there is no need to consider the phraseology "without good cause attributable to the employer." In our interpretation issued January 5, 1944, and designated in your record as Interpretation No. 48, we attempted to lay down some general rules that would be applicable in construing this disqualification clause. The problem of married women separating from their work in order to join their husbands in other communities has been a vexacious problem for the various Unemployment Compensation Boards and Commissions in this country. It has been complicated by the fact that under the common law the husband had a right to choose the domicile; and it was the duty of the wife to reside with her husband at the domicile of his choice unless injurious to her health. Much of the confusion arises from the fact that under the common law the husband was entitled to the company and society of his wife which is designated in legal terms as the right of consortium. When we consider that in the enforcement of the Unemployment Compensation Law we are dealing with a law regulating industrial relationships and we are not dealing with the law of domestic relations, then the problem is not too difficult. In my opinion, there is no justification for attempting to engraft the law of domestic relations into interpretations of Unemployment Compensation Laws. The law of domestic relations regulating the relations between husband and wife belong in one field, and the construction and interpretation of the Unemployment Compensation Law is governed by its own rules of statutory construction. The Unemployment Compensation Law of this State does not attempt by the use of any statutory language whatsoever to incorporate by inference or reference the laws regulating the relationship between husband and wife. Each individual claimant is, and should be, considered on an individual basis, at least in so far as the language of the disqualification statute is concerned which is now under consideration.

In the case of *HUIET v. SCHWOB MFG. CO.*, 27 S. E. (2d) 743, the Supreme Court of Georgia had before it the question we are now considering; and in its opinion, the Chief Justice of the Court said:

"Plainly, a married woman who voluntarily quits her work, for the sole purpose of joining and living with her husband at a point so far away that she cannot continue to work at the same place, leaves her work voluntarily without good cause connected with her most recent employment, within the meaning of the foregoing provision. The fact that she is a married woman and may owe a superior duty to her husband does not place her in duress or destroy her free agency in such matter; and while the cause of her leaving may have been a good cause from the standpoint of society, it was clearly not a cause connected with her employment. Where she thus voluntarily chooses between continuing her employment and living with her husband when she cannot possibly do both, she deliberately waives her status as an insured employee, and must accept the consequences. Even though the

choice so made by her may not be termed a fault, yet the phrase 'through no fault of their own' as used in section 2, *supra*, evidently refers to causes beyond 'their' control, and the matter here was subject to the employee's own volition. In such case the employee becomes the author of her own disqualification; and this is true even though she as a married woman may have chosen the better part, not only for herself, but for society as well."

In the above case, the Disqualification Statute of Georgia is similar to our statute except it reads "without good cause connected with their most recent work," instead of "without good cause attributable to the employer." The above case was also affirmed by the Court of Appeals of Georgia in *HEWIT, COMMISSIONER v. CALLAWAY MILLS*, 29 S. E. (2d) 106.

In the case of *MOORE v. BUREAU OF UNEMPLOYMENT COMPENSATION*, 56 N. E. (2d) 520 (Ohio), the Court said:

"We have been furnished with many authorities on the meaning of the word 'voluntarily.' The dictionary definition is not doubtful. What confronts us is the necessity of determining its meaning as used by the Legislature.

"The context shows that the term is not used as the antonym of physical impossibility. By the terms of subdivision c, if he is discharged for just cause, his benefits are reduced by six weeks, or if his unemployment results from his quitting, his benefits are reduced by the same period, unless there were some reason arising out of his work which justified his quitting. When there is a reason arising out of his work, his benefits are not reduced by six weeks, not because his quitting is involuntary, but because his voluntary act of quitting is justified under the law.

"Now then, this provision is followed by the provision enumerating the absolute bars to benefits notwithstanding unemployment. If the employee quits work voluntarily to marry or because of marital obligations, destroys the employee's volition, every quitting under such circumstances would be involuntary, and the provision would be meaningless. If that had been the intent of the Legislature it would have placed in the appropriate place a provision that quitting to marry or because of marital obligations should be considered involuntary within the meaning of the act. It did not do so. It could not have meant that by the words employed.

"In a certain sense, a person may be said to act under compulsion whenever he performs a moral or legal obligation. He is required or compelled to obey the laws, but a law-abiding citizen usually acts voluntarily to gain that description.

"We construe the language used to mean that when an employee quits to marry or to perform marital obligations, he does so voluntarily and is not entitled to benefits."

In the case of *EX PARTE ALABAMA TEXTILE PRODUCTS CORPORATION*, 7 So. (2d) 303, the Supreme Court of Alabama said:

"We are not aided in determining this question by collateral facts. That is, whether her husband had a good job in New York and was well able to care for her. Nor whether she had children in her family that needed the benefit of a united family. Nor whether her husband had requested her to give up her job and come to live with him. The facts in no respect show that in doing so it was not her own free, voluntary act. The only cause assigned is that she went to live with her

husband, a very commendable impulse. . . . Consortium, to which the husband is entitled, includes the performance by the wife of her household and domestic duties, in the sense of whatever is necessary in that respect according to their station in life. 26 *Amer. Jur.* 637, section 9. We doubt not that this duty persist though the wife should wish to engage in such gainful employment as would prevent her from performing such duties. This Court, was speaking with due regard to such status in observing in the opinion from which we have quoted, that it is *with the consent of the husband*, that she may give up those household duties to perform labor which conflicts with them. She is not wholly a free person to determine whether she shall thus be employed. So that if she gives up such employment in order to render her husband the duties which she owes him, and in recognition of his wishes, the voluntary act of her husband is attributable to her and becomes her voluntary act, though she might have preferred to continue in such employment."

In the case of *WOODMEN OF THE WORLD LIFE INS. SOC. v. OLSEN*, 4 N. W. (2d) 923, the Supreme Court of Nebraska, in dealing with this problem, said:

"It was a legislative purpose to ameliorate ills growing out of labor troubles and unemployment. Protection of the public from pauperism and from other burdens created by unemployment was also in the minds of the lawmakers. The legislature considered these subjects and acted directly on them. Provision was made for the creation, conservation and distribution of funds to make the law effective. These funds were not intended for disqualified claimants for benefits. Disqualification as well as eligibility of claimants must be considered in giving effect to the words 'without good cause.' The legislative act does not deal directly with domestic relations. Of course it is the duty of a wife to live with her husband while the marital relation exists, if conditions permit, but the unemployment compensation law does not relieve the husband from his duty to support his wife. Her employer did nothing to prompt her decision to leave her work. The cause of her voluntary action had no connection with the abandoned relation of employer and employee. The purposes and import of the unemployment compensation law in its entirety indicate that a compensable claim for benefits must have some connection with, or relation to, the employment which the employee has lost. As stated in a recent opinion:

"Disqualification under the act depends upon the fact of voluntary action and not the motives which brought it about.' . . .

"The unemployment compensation act does not purport to grant benefits to workmen who leave their work voluntarily.' *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 2 N. W. 2d 332, 335."

In the case of *JOHN MORRELL & CO. v. UNEMPLOYMENT COMPENSATION COM.*, 13 N. W. (2d) 498, the Supreme Court of South Dakota said:

"From the facts as found by the defendant Commission, it is apparent that claimant left her employment of her own volition and was not discharged. In sustaining the decision of the Appeal Tribunal, the Commission concluded: 'Voluntary separation implies freedom of choice of the individual, either to leave employment or continue working. When the separation is made necessary in the interest of conserving health, there obviously is no freedom of choice, and the separation is not voluntary. A married woman whose separation from her job is necessitated by the danger to her health due to pregnancy, after her confinement, and upon being restored to health and organizing her

household for adequate care of the child, is available for work. If, under these circumstances, she definitely seeks reentry into the labor market, she is entitled to benefits under our law if suitable work is not available.' We agree that claimant was justified in leaving her employment, but it does not follow that she was entitled to unemployment benefits. It appears to us from a consideration of the act that the legislature did not intend that employees who leave their work for reasons not attributable to or connected with their employment should receive benefit payments. Without giving the word 'voluntarily' in section 17.0830 (1), *supra*, an exact definition, we think that it would do violence to the intent and purpose of the statute to hold under the facts in this case that claimant did not 'voluntarily' leave her employment."

In the case of DEPARTMENT OF LABOR, ETC. v. UNEMPLOYMENT COMPENSATION BOARD, ETC., 35 A. (2d) 739, the Court of Pennsylvania considered this question and decided the case upon the meaning of the words "good cause," but in the course of the opinion the Court said: "It must be conceded that claimant voluntarily quit." In this case the wife separated from her work to spend some time with her husband who was a member of the Armed Forces in time of war. There is authority for the fact that termination of employment because of sickness is not voluntary within the provisions of such a disqualification clause. See FANNON v. FEDERAL CARTRIDGE CORP., 18 N. W. (2d) 249 (Minn.).

Modern statutes have relieved married women from all disabilities which existed at common law. To say that a married woman who leaves her work does not deliberately choose to do so of her own will is to discard all considerations of common sense and normal experience. The fact that she acts upon the basis of commendable motives does not destroy her exercise of her own will and volition in the matter. The fact is that in every question in life which we must decide and with which we are confronted, we balance the motives and advantages on either side of the question, one against the other. It is not necessary to go into any discussion of the psychological processes involved in exercising what is usually called "volition" or "will."

Aside from the legal authorities and the arguments that may be made both pro and con on a merit basis, the fact remains that in 1943 many members of the General Assembly proposed to deal with this problem by writing into the disqualification provisions of the Act a specific disqualification to the effect that any married woman who left her work to live with her husband should be disqualified. At that time, the writer was Acting Chairman of the Unemployment Compensation Commission; and Senator Hudgins of Guilford County was appointed by all of the members of the General Assembly interested in the question to prepare a proper bill to achieve this result. At that time, the writer told Senator Hudgins that if he would introduce a bill in the language recommended by the Commission, it would be interpreted by the Commission as achieving the desired result; that is, if a married woman left her work to join her husband, she would be disqualified. It was never considered by Senator Hudgins or the writer that there would be any distinction between a married woman's leaving her work to join her husband who had no fixed domicile and who was engaged in temporary work and the case of a mar-

ried woman's leaving her work to live with her husband who had established a permanent domicile in a place too far away for his wife to remain at work if she joined him. I am sure that if Senator Hudgins had understood that any such distinction would have been made by interpretation, he would have immediately passed a bill calling for a specific disqualification in such a case rather than a general one. In fact, if it is said that a married woman voluntarily leaves her work when she goes to reside with her husband engaged in temporary work and with no domicile, by what logic can it be said that she leaves involuntarily or her will is destroyed simply because she joins her husband who has a permanent domicile. It appears to us that a separation in one case involves just as much exercise of the will as a separation in the other case. The clear weight of legal authority is that such a separation is voluntary.

I am of the opinion, therefore, that your question should be answered as follows: a married woman who follows her husband to a new place of residence, or a new domicile, where he has secured work and such place is too far removed for the woman to continue her work, it should be considered by the Commission, upon proper findings of fact, that such a married woman voluntarily separated from her employment without good cause attributable to the employer. This opinion is based upon the facts stated in the letter in question; and while we decide in this opinion that such a separation is voluntary, we do not mean that there may not arise cases wherein, although the separation of such a married woman is voluntary, nevertheless, there would be good cause attributable to the employer under specific circumstances as found by the Commission. In other words, we are merely giving our opinion upon the question of whether such a separation is voluntary or involuntary.

NORTH CAROLINA STATE EMPLOYMENT SERVICE DIVISION OF THE EMPLOYMENT SECURITY COMMISSION; S. B. No. 11, SUPPLEMENTAL APPROPRIATIONS ACT FOR THE 1945-47 BIENNIUM; S. B. No. 363, AMENDMENT TO SUPPLEMENTAL APPROPRIATIONS ACT; EMERGENCY BONUS FOR STATE EMPLOYEES; APPLICATION OF SUPPLEMENTAL APPROPRIATIONS ACT, AS AMENDED, TO EMPLOYEES OF THE NORTH CAROLINA STATE EMPLOYMENT SERVICE DIVISION OF THE EMPLOYMENT SECURITY COMMISSION

5 June 1947

In your letter you refer to S. B. No. 11, which for the sake of brevity, I will refer to as the Supplemental Appropriations Act for the 1945-47 Biennium. This Act authorizes the Director of the Budget to allocate out of operating funds used for employing and paying State personnel amounts sufficient to provide an additional emergency bonus for services rendered by State employees, the formula to be applied to the various salary scales set forth in the Act and is not pertinent to the matters here under consideration. I note from the Act the method of payment is as follows:

"The emergency bonus herein provided for shall be payable to all teachers and State employees who were in the employ of the State on November 1st, 1946, and who have continued in such employment until February 25th, 1947, as follows:

"One-half of the total of said emergency bonus at the time of the issuance of the regular salary checks during the month of February, 1947, and the remaining one-half of said emergency bonus shall be prorated according to the number of the regular monthly salary checks issued to such teachers and State employees for the remainder of the period ending June 30, 1947; provided however, that any teacher or State employee entering the employment of the State between the period beginning November 1st, 1946, and ending February 25th, 1947, shall receive the proratable portion of the first one-half of the total of said emergency bonus herein provided for at the time of the issuance of the regular February salary check to such teacher or State employee and thereafter shall be paid as above provided."

You also refer to S. B. No. 363, which is an amendment to the Supplemental Appropriations Act for the 1945-47 Biennium, same being ratified on the 3rd day of April, 1947, the pertinent portion of same being as follows:

"Except that contingent upon availability of funds from the Federal Government employees of the North Carolina State Employment Service Division of the Unemployment Compensation Commission of North Carolina on November 16th, 1946, shall receive credit for the period from November 1st to November 15th, 1946, and said emergency bonus for the period from November 1st to November 15th, 1946, shall be payable at the time of the issuance of the regular June salary check."

You point out in your letter that for the period of time beginning with November 1 and continuing through November 15, the North Carolina State Employment Service Division of the Unemployment Compensation Commission was not engaged in the State service, and for that period of time was still engaged in Federal service with the War Manpower Commission. On November 16, 1946, however, the North Carolina State Employment Service Division of the Unemployment Compensation Commission was returned to State service, and as I understand it, November 16, 1946, was the first day of State service for the employees of that division. Certain questions have arisen as to the application of this bonus, or the method of payment of same to the employees of the North Carolina Employment Service Division which involve interpretations of the two above-quoted statutes, and I have arranged your questions as follows:

1. Does the bill, as amended, provide that an individual who was an employee of the Employment Service Division of the Unemployment Compensation Commission of North Carolina on November 16, 1946, would have had to continue in employment with that agency until the issuance of the regular salary checks in June 1947?
2. Would such employee have had to have continued in employment from November 16, 1946, until sometime during the month of June 1947, and be entitled to draw a salary check for some services performed during the month of June, 1947, before being entitled to the emergency bonus provided for in the amendment?
3. Does the Act provide that if an individual was employed by the Employment Service Division of the Unemployment Compensation Commission of North Carolina on November 16, 1946, (the date of the return of the Employment Service Division to the State by the Federal Government) and who continued in such employment until February 25, 1947, that such person would be entitled to the emergency bonus

provided for by the amendment regardless of whether such employee continued in employment with the Employment Service Division of the Unemployment Compensation Commission subsequent to February 25, 1947?

The purposes of S. B. No. 363, according to the caption of the Act, was to allow employees of the North Carolina State Employment Service Division of the Unemployment Compensation Commission the same amount of the emergency bonus as allowed other State employees. The Supplemental Appropriations Act (S. B. No. 11) was ratified on the 28th day of January, 1947, but from the provisions in the above-quoted Act it will be seen that its application was made retroactive to November 1, 1946, and as an additional qualification or requirement such employees must have been in State service on November 1, 1946, and continued in State service until February 25, 1947. Employees who entered the State service between the two qualification dates were entitled to receive the bonus, but the same was prorated according to the time of the service. You will further observe that the first half of the bonus was paid in the February salary check. The last half of the bonus was prorated according to the number of regular monthly salary checks issued for the remainder of the period ending June 30, 1947.

From what I have said above, it is apparent that the employees of the North Carolina State Employment Service Division could not fully share in the emergency bonus for the period of November 1 through November 15, 1946, because they were not on the State payroll. S. B. No. 363 was therefore passed by the General Assembly of this State in order to equate the payment periods of the employees of the North Carolina State Employment Service Division with the payment periods of other regular State employees whose period of State service had not been interrupted by Federal service, and it was the intent and purpose of the Act or amendment to place the employees of the North Carolina State Employment Service Division on the same basis as other State employees in applying the conditions and formula for the payment of the emergency bonus as provided by the Supplemental Appropriations Act. Obviously, the employees of the North Carolina State Employment Service Division could not be paid the full half of their bonus on February 25, 1947, because at that time they did not have credit for the period of November 1 through November 15, 1946, and they did not receive credit for that period until S. B. No. 363 was ratified on the 3rd day of April, 1947. It was, therefore, necessary to provide in S. B. No. 363 that the emergency bonus for the period from November 1 through November 15, 1946, could be payable at some other time than the regular statutory time of February 25, 1947, and this time was fixed in S. B. No. 363 at the June 1947 salary check.

It, therefore, appears to me that the same conditions and qualifications as to the payment of the emergency bonus apply to the employees of the North Carolina State Employment Service Division as apply to any other regular employees of the State and as fixed by S. B. No. 11, the same being the Supplemental Appropriations Act. The only effect of the amendment was to bring in the period of time that the North Carolina State Employment Service Division employees had lost and to fix a different time of payment for that period. The fact that S. B. No. 363 states that the

emergency bonus for the period from November 1 to November 15, 1946, "shall be payable at the time of the issuance of the regular June salary checks," did not fix any condition or qualification as to employment, nor did it require that a person must be in the employment of the North Carolina State Employment Service Division for any part of the month of June or at the time the June salary check is paid. It simply fixed the June salary check as the time of payment for the November 1 to November 15 period. The requirements as to the necessary length of time being in employment as required by S. B. No. 11 are the same as for any other regular State employee; that is, employment from November 1, 1946, until February 25, 1947. It is clear that if the Act (S. B. No. 363) had intended for a person to be in employment until the payment of the June salary check as a condition of receiving the bonus for the period in question, then it would have said so. S. B. No. 11 clearly said that employees must be in employment from November 1, 1946, until February 25, 1947, in order to receive the full bonus. In other words, both Acts are clear as to their requirements.

I am of the opinion, therefore, that your first two questions must be answered "no" and the third question must be answered "yes." Under these two Acts it is not necessary for an employee to be in service until the payment of the regular June salary check, or to be in service for any time during the month of June 1947. If an individual employed by the North Carolina State Employment Service Division was in employment with that division from November 1, 1946, until February 25, 1947, such person is entitled to the emergency bonus provided for by the amendment regardless of the fact that such employee separated from service and did not continue in employment with the North Carolina State Employment Service Division of the Unemployment Compensation Commission subsequent to February 25, 1947. In other words, you should apply and pay this emergency bonus to these employees in the same manner as any other employees of the State. The only difference being that you cannot pay for this period of time until the issuance of the regular June salary check. You will see, therefore, that I am in agreement with the opinion expressed by you in the last paragraph of your letter.

NORTH CAROLINA STATE EMPLOYMENT SERVICE DIVISION; APPLICATION OF
SENATE BILL 367, SESSION OF 1945 AND HOUSE BILL 362, SESSION OF
1947 TO EMPLOYEES OF NORTH CAROLINA STATE EMPLOYMENT SERVICE
DIVISION; TEACHERS' AND STATE EMPLOYEES' RETIREMENT
SYSTEM; EMPLOYER'S CONTRIBUTION; METHOD OF
FINANCING AND COMPUTATION

15 July 1947

In your letter of June 30th, 1947, you refer to Senate Bill 367 of the Acts of 1945, the same being Chapter 799 of the Session Laws of 1945; and you also refer to House Bill 362 of the Session Laws of 1947. Both of these bills or laws deal with membership in the Teachers' and State Employees' Retirement System of individuals who were employed by the United States Employment Service subsequent to January 1st, 1942 and those individuals who were transferred to the United States Employment Service from the North Carolina State Employment Service Division of

the Employment Security Commission on January 1, 1942. You will further recall that these employees were returned to the State of North Carolina pursuant to an Act of Congress; and hence your questions arise out of this situation and these acts above designated which were designed to protect the rights of these employees in the State Retirement System.

As to Senate Bill 367 of the Acts of 1945 (Chapter 799), you inquire whether or not, under the provisions of this Act, the employer is required to make contributions to match the deductions of an employee. You further ask that if the employer is required to make such a contribution, how is the contribution computed.

As to House Bill 362 of the Session Laws of 1947, you call attention to the fact that this bill specifically provides that an employer shall make contributions; but you inquire as to how the employer's contributions will be computed.

The first sentence of Chapter 799 of the Acts of 1945 simply provides that those employees who were taken over from the Federal Government on a loan basis, by virtue of the executive order of the President, and who were members of the Retirement System and who had not withdrawn all of their accumulated contributions, should be deemed to be members of the Retirement System during the period of Federal service. My explanation is in the plural, and the statute is written in the singular. Emphasis is made on the fact that such person is deemed to be a *member* of the System. The second sentence of this Act provided that any such employee who was again employed by the State within a period of six months after cessation of Federal service should be permitted to resume active participation in the Retirement System and to resume his or her payments to the System as required by the Act. The third sentence of this Act deals with the period of time under Federal service. The employee was allowed to pay into the Retirement Fund an amount equal to his or her accrued contributions previously withdrawn, with interest; and in addition, the employee could pay in the accrued contributions, with interest thereon, that he would have made within such period of Federal employment to the same extent as if such employee had been engaged in membership service for the State or any other employer as defined in the State Retirement Act. These payments were to be computed on the basis of the salary or earnable compensation received by such person on the effective date of the executive order. It will be noted that at this time these employees have not been returned to the State of North Carolina. You will note that Chapter 464 of the Session Laws of 1947 (H. B. 362) deals with the same situation entirely except that it is careful to include the employees who were employed subsequent to January 1st, 1942, which, to my way of thinking, also includes those employees who were taken over from the State by the Federal Government because it naturally follows that if they continued in employment, they were employed subsequent to January 1st, 1942 and during the period of time during which these employees were in the service of the Federal Government.

Referring to the Act of 1945, I think that the fact that such employee was designated as a "member" of the Retirement System during this period of Federal service requires that the employer shall make the necessary contributions if the employee deposits with the Board of Trustees of

the Retirement System his accrued contributions, both those withdrawn and those that would have been made during the period of Federal employment had such person been in State employment. "A member" is a defined term in the Retirement Act. See subsection (6) of Section 135-1 of the General Statutes. The Act further says that these persons shall be deemed to have been engaged in "membership service" for this period of time. The term "membership service" is a defined term in the Retirement Act. See subsection (11) of Section 135-1 of the General Statutes. Therefore, it follows that when a person is a member of the Retirement System and is engaged in membership service, he is entitled to all of the benefits conferred by the Retirement Act; and among these, he is entitled to have his employer, which but for the supervision of Federal control would have been the North Carolina State Employment Service Division, contribute matching funds according to the method of financing set forth in Section 135-8 of the General Statutes. These sections that I have just cited will show that the employer does not pay any fixed contribution; but his contribution is computed according to the actuarial formula set forth in these sections, and I refer to all of the subsections contained in Section 135-8. You will note that the contributions of the employer, which are made to finance the employer's part of the System and in consideration of the deductions made from the employee's salary, are placed in the Pension Accumulation Fund. Your attention is especially called to Section 135-12 which specifies the obligations of the Pension Accumulation Fund and provides that all income, interest and dividends derived from deposits and investments authorized by this chapter shall be used for the payment of the obligations of this Fund. Again Section 135-7 permits the Board of Trustees to invest the funds for the purpose of income. You will note also that there is a definition of "regular interest" which is found in subsection (14) of Section 135-1 and further that "regular interest allowance" is defined in subsection (2) of Section 135-7.

It is apparent to me, therefore, that under Chapter 799 of the Session Laws of 1945, the employer, which is in this case the North Carolina State Employment Service Division, is required to make the contributions provided for in the State Retirement Law, which is Chapter 135 of the General Statutes, as amended, and that these contributions, therefore, should be computed just as any other contributions and according to the same formula, computations to be based upon the contributions that this employer would have made had its employees been engaged in State service during the period of Federal service. This would include the payment, by the employer or the North Carolina State Employment Service Division, of the pro rata amount of the earnings on these contributions based upon the supposition that had these contributions been normally made to the Fund, they would have earned their proportionate amount on investment of same made by the Trustees of the State Retirement System. This is a fixed amount and can be computed by the actuary and accountants of the Retirement System by applying the income or investment return for that period of time to the amount of contributions involved. This will also involve the payment of such an amount as may be necessary, which, added to the earnings, will create a regular interest allowance of four per cent (4%), which is the maximum provided by subsection (2) of Section 135-7 or, in other words, it seems to me that the North Carolina State Employ-

ment Service Division should pay four per cent (4%) both to cover the regular interest allowance and as a normal part of the employer's contribution to match the interest paid by the employee. It is understood, of course, that in all of these cases no contribution will be paid for any employee who does not meet the terms of these statutes.

As to House Bill 362, enacted by the Session of 1947, there is, of course, no question as to the requirement that the employer make these contributions; and as I have heretofore pointed out, in my opinion, this Act is broad enough to cover all of the employees of the North Carolina State Employment Service Division, whether taken over on January 1st, 1942 by the Federal Government or employed subsequently. I do not believe it provides for the return, on the part of the employee, of accumulated contributions withdrawn; but the Board of Trustees has the power to make regulations to administer the Act and can include this in its regulatory power. It follows, therefore, from what I have said above that the employer's contributions in this case will be calculated according to the actuarial formula now in force in the Retirement System and which sections I have designated above and that this will also include the allowance for regular interest as explained in connection with the Act first above designated.

You can well see that I can only state the general principles applicable to the computation and that the actual mathematical computation is a matter for the Actuary of the System and the auditors and accountants.

FEES; PROPER FEE FOR SHERIFF OF HYDE COUNTY FOR SERVING SUBPOENA
OF COMMISSION; MILEAGE

2 December 1947

Reference is made to your letter of November 24th, 1947, wherein you state that the Sheriff of Hyde County has submitted a bill for the service of a subpoena of the Commission wherein he has also made a charge for mileage in connection with the service of such subpoena. You state that the Commission declined to pay the mileage requested, and the Sheriff has declined to revise his statement of charges and still insists upon the payment of mileage. You set forth in your letter the reasons given by the Sheriff as to why he thinks mileage should be allowed. You further state that your Commission wishes to pay mileage to the Sheriff of Hyde County if such mileage is proper under the law.

You inquire of this office if it is proper for your Commission to allow the Sheriff of Hyde County mileage in connection with the service of a subpoena of the Commission.

Under Chapter 198 of the Public-Local Laws of 1935, the Sheriff of Hyde County "shall receive such fees and commissions for his services as Sheriff and Ex-Officio Tax Collector of Hyde County as are now or may hereafter be prescribed by the public laws of North Carolina, fixing and regulating the compensation of sheriffs and ex-officio tax collectors." This public-local act placing the Sheriff of Hyde County on a fee basis, as provided by the General Statutes, has not been modified or repealed. The General Assembly of 1947 allowed the Sheriff of Hyde County the sum of one hundred dollars (\$100.00) for his attendance on each term of the

Superior Court of the County and ten dollars (\$10.00) a month for his attendance on each term of the Recorder's Court of Hyde County; but the general fee bill for the Sheriff, as fixed in 1935, was not changed.

In our opinion, therefore, the Sheriff of Hyde County is entitled to such fees as are fixed by Section 162-6 of the General Statutes. Under this section, a sheriff is allowed actual expenses in certain instances, such as conveying prisoners to jail or conveying prisoners to the Penitentiary. There is no instance in this section where a sheriff is allowed mileage for the service of any process except in the next to the last paragraph in the section. This paragraph, which allows mileage under certain extraordinary conditions, must be construed in connection with Section 1-91 of the General Statutes, which provides in substance that if there is no proper officer in the county to whom summons or other process can be directed or if such officer refuses or neglects to execute the same, the clerk of the Court of the county, under certain conditions, can issue such process to the sheriff of any adjoining county; and this sheriff can execute the process as if he were the sheriff of the county concerned. In this instance, under the provisions set forth in the next to the last paragraph of Section 162-6, the sheriff of such adjoining county can charge mileage.

We are of the opinion that if the subpoena in question originated and was signed outside of the County of Hyde and was sent to the Sheriff of Hyde County for service, then his fee would fall within the proviso of the next to the last paragraph in Section 162-6, which reads as follows:

"And that for subpoenas served from other than the county of said sheriff, he shall receive a fee of fifty cents (50c) for each witness named therein."

If, on the other hand, the subpoena was issued by one of your deputies or authorized agents while he was in Hyde County for a hearing to be held in Hyde County, then the proviso would not be applicable; and the Sheriff would be entitled to the regular fee of thirty cents (30c) for executing a subpoena on the witness which is provided by Section 162-6. Of course, if the Sheriff of Hyde County serves a subpoena on certain waters of the State, as provided by Section 162-7, then he would be entitled to boat hire or the three-dollar fee as provided by Section 162-7, which is an exception and governs service of process on the sounds and waters therein named.

We realize that the Sheriff of Hyde County is no doubt losing money because of the expenses involved in serving process in his County and because of the unusual local conditions which prevail in his County. His fees, however, are fixed by law; and no matter what unusual conditions are involved, we are compelled to give you our opinion based solely on the statutory provisions. We have no authority to vary the fees fixed by law because of unusual conditions. The remedy of the Sheriff of Hyde County is to have the fee bill adjusted in the General Assembly.

OPINIONS TO INDUSTRIAL COMMISSION

SALES TAXES; SALES OF MATERIALS AND SUPPLIES TO BE PAID FOR OUT OF INDUSTRIAL COMMISSION'S SECOND INJURY FUND

9 June 1947

I have your letter of June 6, 1947 in which you request my opinion as to whether or not sales taxes are due on sales of materials and supplies made under the following circumstances:

For the purpose of creating a second injury fund to be held and disbursed by the Industrial Commission, the Commission is authorized by G. S. 97-40 to make certain assessments against employers or their insurance carriers in certain cases of compensable injuries to employees. Under G. S. 97-29, as amended, disbursements from the second injury fund may be made in certain cases for necessary nursing, hospital, and medical expenses. In many cases of permanent injuries, particularly spinal injuries, the Commission finds that special mattresses and other articles of tangible personal property are necessary to the comfort and well-being of the injured employee. In such cases, the Commission places an order with a dealer or manufacturer for the desired article. The article is shipped or delivered to the injured employee on the order of the Commission and the dealer or manufacturer receives payment direct from the Commission.

I am of the opinion that no sales taxes are due on account of sales of tangible personal property sold under the circumstances outlined above. Such a sale is, in my opinion, a sale to the North Carolina Industrial Commission and not a sale to the injured employee. The fact that the dealer or manufacturer delivers the article to the injured employee instead of to the Commission is immaterial. A sale may be completed by delivery to a third person at the instance of the purchaser. 46 *Am. Jur. Sales*, paragraph 171.

The sale being thus made to the Industrial Commission it is exempted from the sales tax by subsection (d) of G. S. 105-169, which exempts sales made to the "State of North Carolina or any of its subdivisions."

OPINIONS TO RETIREMENT SYSTEM

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; NOTICE BY EMPLOYER OF MEMBER REMAINING IN SERVICE AFTER AGE 65; TO WHOM NOTICE GIVEN; CONTINUANCE IN SERVICE WITHOUT REQUIRED NOTICE; AGENCY RESPONSIBLE FOR ENFORCEMENT OF PROVISIONS OF SECTION 135-5 (b)

5 September 1946

In your letter of September 3, 1946 you ask certain questions as follows:

"Is the 'Notice' required in section 135-5 (b) a notice to the Retirement System or a notice to the employee?"

"If the 'notice' required in section 135-5 (b) is a notice to the Board of Trustees, as I presume it is, does the law have the effect of prohibiting a person past 65 years of age from continuing in service unless the required notice is given?"

"Who is responsible for the enforcement of the above provisions?"
Section 135-5 (b) is as follows:

"Any member in service who has attained the age of sixty-five years shall be retired at the end of the year unless the employer requests such person to remain in the service, and notice of this request is given in writing thirty days prior to the end of the year."

It is obvious from reading the provisions of the whole act that notice of the employer of a request that the member shall remain in service must be made and given to the Board of Trustees administering the Retirement System. Unless such notice is given, the retirement of the member is mandatory at the age of sixty-five years. This notice of request to remain in service, therefore, becomes an important part of the records of the Retirement System and is the authority of the Board of Trustees for allowing the member to remain in service. It would be a vain thing to give the notice to the member or employee only and thus leave the Retirement System in the position of treating the person as retired at age sixty-five because of the mandatory features of the law.

As to your second question, the answer is that the Teachers' and State Employees' Retirement Act prohibits a person who has attained the age of sixty-five years from continuing in employment or in service unless the required notice is given. This provision of the act is mandatory since Section 135-5 (b) plainly states that any member in service who has attained the age of sixty-five years shall be retired at the end of the year unless notice of request to remain in service is given in writing thirty days prior to the end of the year.

In your third question you ask who is responsible for the enforcement of the above provisions. The answer is that the Board of Trustees of the Teachers' and State Employees' Retirement System is responsible for the

enforcement of the retirement provisions contained in Section 135-5 (b) of the General Statutes. It is provided in Section 135-6 of the General Statutes as follows:

"The general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of the chapter are hereby vested in a board of trustees which shall be organized immediately after a majority of the trustees provided for in this section shall have qualified and taken the oath of office."

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; DEFINITION OF THE WORD "YEAR"; EFFECT OF MANDATORY RETIREMENT AT AGE 65 ON CONTINUING CONTRACT OF TEACHER; EFFECT OF NOTICE OF RETENTION IN SERVICE AT AGE 65 UPON CONTINUING CONTRACT OF TEACHER; NUMBER OF NOTICES REQUIRED

26 September 1946

I reply to your letter of September 24, 1946 in which you ask this office to answer certain questions as follows:

"Does 'end of the year' of section 135-5 (b) refer to end of calendar year, end of school year, end of fiscal year, or end of term of contract?

"Does the mandatory retirement at age 65 automatically terminate contract and take precedence of the continuing contract clause of section 115-354?

"Does one notice of retention in service at age 65 again place the employee under the continuing contract provision of 115-354 until the age 70 or does the purpose of the law justify that this notice be filed every year after age 65?"

The answer to your first question is that the statute contemplates the end of a calendar year and not the end of a school year or the end of a fiscal year nor the end of any term or fixed period in a contract. Under the provisions of Section 12-3 of the General Statutes, certain rules for the construction of statutes have been laid down by our Legislature; and Subsection 3 of this section is as follows:

" 'Month' and 'year'. The word 'month' shall be construed to mean a calendar month, unless otherwise expressed; and the word 'year', a calendar year, unless otherwise expressed; and the word 'year' alone shall be equivalent to the expression 'year of our Lord.' "

Under our law, therefore, unless the particular statute involved defines the word "year" or classifies the meaning such as a fiscal year or otherwise, then the word "year" when standing alone must be construed as a calendar year. The act creating the Teachers' and State Employees' Retirement System does not define the word "year" where the term stands alone. You will, therefore, consider the end of the year as contemplated by Section 135-5 (b) as the end of the calendar year.

The answer to your second question is that the mandatory retirement at age 65 as provided by Subsection (b) of Section 135-5 automatically terminates any teacher's contract at the end of the calendar year; and this mandatory, statutory requirement is superior to and takes precedence over the continuing contract clause as set forth in Section 115-354 of the General Statutes. It is my opinion that all contracts of service between

an employer and an employee or teacher, as those terms are defined under the Teachers' and State Employees' Retirement Act, are subject to the mandatory retirement provisions of the Act. Section 115-354 gives continuity of contract to teachers, but this continuity only exists so long as the teacher is able to perform the contract and is not prevented from doing so by other pertinent statutory provision. The mandatory retirement feature of the retirement act renders the teacher ineligible to perform the service; and all such contracts are made subject to the mandatory retirement provisions as if the statute had been written into the contract. In the case of *HOOD, COMR. of BANKS v. SIMPSON*, 206 N. C. 748, 757, it is said:

"It is well settled that general laws of a State in force at time of execution and performance of a contract become a part thereof and enter into and form a part of it, as if they were referred to or incorporated in its terms. *VAN HOFFMAN v. QUINCY*, 4 Wallace 535 (550), 18 L. Ed., 403 (408); *FARMERS AND MERCHANTS BANK OF MONROE, NORTH CAROLINA, v. FEDERAL RESERVE BANK OF RICHMOND, VA.*, 262 U. S., 649 (660); 67 L. Ed., 1157 (1164); *O'KELLY v. WILLIAMS*, 84 N. C., 281 (285); *GRAVES v. HOWARD*, 159 N. C., 594; *HOUSE v. PARKER*, 181 N. C., 40 (42); *RYAN v. REYNOLDS*, 190 N. C., 563 (565)."

To interpret the law otherwise would, to a large extent, destroy some of the primary mandatory features of the retirement system and curcumvent and nullify the statute. If teachers can refrain from retiring simply because they have a continuing contract, then I see no reason why any State agency could not likewise nullify the retirement provisions by simply agreeing that the contract should be continuing irrespective of the fact that the employee attains the age 65. All employees or teachers under the System, therefore, are subject to the retirement provisions irrespective of continuity of contract. The continuity of contract provision assumes the eligibility of the teacher; and where the teacher is rendered ineligible by statute, the continuity provision ceases to be applicable to that particular teacher.

As to your third question, it seems to me that the provisions of Subsection (b) of 135-5 contemplates that only one notice shall be given if the employer desires to retain the employee or teacher in service when such employee or teacher has attained the age of 65. This notice must be given in writing to the Board of Trustees of the Retirement System thirty days prior to the end of the year, and I call your attention to the fact that the end of the year mentioned in this clause means the end of the same year in which the employee attains the age of 65. Of course, if the member attains the age of 65 years a few days before the end of the year, the thirty days' notice before the end of the year must still be given. In other words, the employer must anticipate in his notice the fact that the employee will attain the age of 65 prior to the close of the year although the birthday will be less than thirty days before the close of the year. It is my opinion, therefore, that one notice, properly given, will retain the teacher in service under the continuing contract provisions until the teacher reaches the age of seventy years and that for all years prior to seventy years, it is not necessary to file a notice of retention every year.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM;
ELIGIBILITY FOR PRIOR SERVICE

18 February 1947

In your letter of February 3, 1947 you quote the statute on allowance for prior service which is Section 128-26 of the General Statutes, and you inquire as follows:

"May a member be given credit for service with a participating employer if he had a break in service and was not employed at any time during the year immediately preceding the date of participation of the employer, even though he becomes a member during the first year following the date of participation?"

The statute which you quote answers your question; and that is, to be eligible for prior service, a member must be an employee for sometime during the year immediately preceding the date of participation of his employer; and in addition, such employee must become a member during the first year thereafter. The requirements of employment in the year preceding and membership in the first year after the date of participation are co-existing requirements; and in our opinion, no person is eligible for prior service who does not meet both requirements.

LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM; COUNTY OF
EMPLOYER; COVERAGE OF EMPLOYEES OF COUNTY LIBRARY UNDER
LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM

17 July 1947

For some time I have had before me your letter requesting that this office answer certain questions pertaining to the coverage of the employees of a county library under the Local Governmental Employees' Retirement System. Part of my delay has been due to the fact that I had to obtain the necessary information as to the organization and operation of the library in question. Through the kindness of Honorable Junius C. Brown, County Attorney of Rockingham County, I now have the necessary information; and I am, therefore, answering your inquiries.

Your letter specifically relates to the employees of the Rockingham County Library and generally deals with the problem of whether or not they are eligible to participate in the Local Retirement System. It appears from the information that I now have in the office that Rockingham County is now participating in the Local Retirement System, such participation having been made effective as of July 1st, 1945. It further appears that the Library was first organized as a corporation under the laws of this State, and the Board of County Commissioners had a contract with this corporation to give county-wide library service to the people of the County. Thereafter, in May 1945, a special election was held in Rockingham County; and a special tax levy was voted for the support of the Library. It further appears that this election was held under the provisions of Article 8 of Chapter 160 of the General Statutes, dealing with the financing and establishment of public libraries. After this election was held and the tax levy voted, the Library proceeded to act under the

authority of Article 8 of Chapter 160 of the General Statutes, to have trustees appointed under that authority; and the trustees proceeded to exercise such powers and duties as are authorized by this general law. The Library ceased to operate as an independent corporation and apparently abandoned all methods of operation authorized by the former corporate authority. The Library also, after this election, apparently received some funds in the form of State aid from the State Library Commission. It appears, therefore, that the Library has been operating under the authority of and according to the procedures provided by Article 8 of Chapter 160 of the General Statutes since some time in May 1945.

Your questions are as follows:

1. Since Rockingham County is participating in the Retirement System, does that mean that members (employees) of the Library are required to be members of the System?

2. If it is your opinion that the Library employees may participate in the Local Retirement System, is it mandatory that they participate?

3. If the law requires the Library employees to be covered under the Local Retirement System, can the Secretary-Treasurer of the Library prepare a payroll for Library employees and forward it to the County Auditor of Rockingham County together with the Library checks for employee deductions and employer contributions to the end that the County Auditor may forward both his regular county payroll reports and the Library payroll reports where they would be treated as the report of one unit, that is, the report of Rockingham County?

If the Rockingham County Library is a mere agency, department or adjunct of Rockingham County, then, of course, the Library employees, for all practical and legal purposes, are county employees and would have to be covered under the Local Governmental Employees' Retirement System since Rockingham County has elected to participate in that System as an employer. On the other hand, if the Rockingham County Library is an independent, separate, governmental unit, separate and apart from the County Government, then the employees of the Library would not be covered under the Local Retirement System because library units within themselves do not come within the definition of an employer as defined in the Local Retirement System Act.

Under the provisions of Article 8 of Chapter 160 of the General Statutes, beginning with Section 160-65, a county library established under this article is managed by a board of six trustees. These trustees are appointed by the board of county commissioners. (See Section 160-66) The trustees hold office for six years, and all vacancies are filled by the board of county commissioners. The county commissioners can remove any trustee for incapacity, unfitness, misconduct, or for negligence of duty. The trustees appoint a secretary-treasurer, but this secretary-treasurer gives bond to the county for the faithful discharge of his official duties. The trustees have control over the expenditure of funds and have supervision, care and custody of the rooms and buildings of the library; but all money received for the library is paid into county treasury where it is kept in a separate fund; and library funds are paid out to the secretary-treasurer of the trustees upon the requisition of the board of trustees. The board of trustees cannot lease, occupy or purchase or erect any library building without the consent of the county commissioners. The board of

trustees must make an annual report to the county commissioners, which report contains a financial accounting as well as an inventory of books and property. The board of trustees cannot accept any gift or devise without the consent of the county. All property given, conveyed, donated or in any manner transferred to the library must be held in the name of the county; and any and all such gifts or donations are deemed to have been made directly to the county. The county has power to pass ordinances imposing penalties for any injury committed upon such library or the grounds or property thereof or for injury to or failure to return books, magazines, etc. While there are other powers, the above enumeration states in substance the controls exercised by the county over such library.

I think, therefore, that this situation is entirely analogous to the situation of the Library of the City of Wilmington which was passed upon by our Supreme Court in the case of *HUNTER v. RETIREMENT SYSTEM*, 224 N. C. 359, 363, where the Supreme Court reviewed the control of the City of Wilmington over the Trustees of the Wilmington Public Library and held that the employees of the Wilmington Public Library were in fact employees of the City and were, therefore, covered under the Retirement System of the City of Wilmington. In holding that these employees were covered under the Retirement System of the City, the Court said:

"The present Wilmington Public Library was created pursuant to ch. 138, Private Laws 1907. Section 1 of this Act makes it mandatory upon the Board of Aldermen of the city of Wilmington to elect five persons as trustees to control and maintain a free library. Chapter 5, Private Laws 1921, removes the limitation of appropriations to the library by the city. The Wilmington Public Library is governed by three trustees appointed by the councilmen of the city of Wilmington, and any vacancy occurring among the trustees is filled by the said councilmen. The furniture and equipment of the City Library is the property of the city, and is all housed in quarters in the City Hall, which quarters are furnished free of charge by the city to the library. The councilmen of the city of Wilmington appropriate \$5,000.00 a year, in equal monthly installments, to the Wilmington Public Library for its upkeep and maintenance, and the trustees, through their secretary, reports to the city councilman all receipts and disbursements. The employment of and salaries of employees are passed upon by the trustees. The commissioners of New Hanover County appropriate \$1,000.00 annually for the operation of a bookmobile throughout the county, which is supervised and controlled by the said trustees of the Wilmington Public Library. This bookmobile, however, is a distinct and separate operation carried on by said trustees. The appropriation by the city councilmen to the Wilmington Public Library is made from the city's general tax fund. The trustees appointed by the city councilman exercise absolute authority and control over the Wilmington Public Library, its personnel, payment of salaries and policies of operation.

"The law under which the library is created makes its establishment mandatory upon the city government, and the city is obeying the mandate of the law when it pursues the method it has pursued in establishing and operating the library. The Wilmington Public Library as created and operated is but an agent of the council of the city of Wilmington to carry out the mandate of the law. The library is entirely dependent upon city government for its functioning and very existence. Since the Wilmington Public Library is but an agent of the city of Wilmington, under its complete control, it follows that the employees of the library are employees of the city.

"We are therefore of the opinion that there was no error in the holding of his Honor below that the employees of the Wilmington Public Library were employees of the city of Wilmington, and as such were eligible to the benefits of the Retirement System under the provisions of ch. 708, Session Laws, 1943."

If anyone will review Chapter 138 of the Private Laws of 1907, under which the Library of the City of Wilmington operated, he will find that the controls of Rockingham County over its Public Library are more numerous and much stronger than the controls exercised by the City of Wilmington over its Public Library. Incidentally, the coverage of the Retirement System of the City of Wilmington is contained in Chapter 708 of the Session Laws of 1943; and the word "employee", under this Act, was defined to mean "anyone in the employ of the City, whether elected or appointed." I am of the opinion, therefore, that the decision in the HUNTER CASE, which is cited and quoted from above, is controlling in this matter and that the Rockingham County Library is but an agent of the County of Rockingham to carry out the mandates of the Library Law. As in the Wilmington case, it seems to me that the Rockingham County Library is entirely dependent upon the County Government for its functioning and existence.

I, therefore, answer your first question to the effect that the employees of the Library are required by law to be members of the Local Retirement System.

I answer your second question to the effect that it is mandatory that these employees participate in the Local Retirement System since Rockingham County is already an employer as defined by the Local Retirement System Act.

I answer your third question that, in my opinion, the Secretary-Treasurer of the Library can prepare the payroll for the Library employees and send it to the County Auditor of Rockingham County with proper checks and employee deductions and employer contributions and that the County Auditor may, in turn, forward this with his regular County payroll report to your office where you can treat the report as one unit, that is, as the report of Rockingham County on all of the employees, including the Library employees, as covered under the Local Retirement System.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; MEMBER;
EXTENT OF FIVE-YEAR PERIOD OF PERSONS IN FEDERAL SERVICE

30 October 1947

Reference is made to the letter of Mr. N. H. Cox, Chief Auditor, setting forth certain facts about the status of R. Mayne Albright. I also have a copy before me of a letter to the Teachers' and State Employees' Retirement System signed by Mr. R. Mayne Albright giving certain facts in this matter.

The whole question is whether or not the five-year validity period for Albright has expired. Albright was in military service until March 21st, 1946. He returned to the United States Employment Service in North Carolina on January 5th, 1946 and remained until the 30th of September, 1946.

The first sentence of Chapter 799 of the Session Laws of 1945 makes employees who went with the Federal Government, by virtue of the Executive Order of the President, a member of the Retirement System; and "such employee shall be deemed to be a member of the Retirement System during such period of Federal service or employment by virtue of such Executive Order by the President of the United States." This makes Albright's service with the Federal Government the equivalent of membership service in the State System; and, therefore, Mr. Albright's five-year validity period would date from October 31st, 1946. The second and third sentences of Chapter 799 of the Session Laws of 1945 provided for resumption of contributions by those who returned to the service of the State. Albright did not return to the service of the State; and while the first sentence of this Chapter does retain his membership in the System, he could not be allowed to make contributions because of his failure to return to service unless the Board of Trustees of the System wishes to allow him to make such contributions under Paragraph 6 of Section 135-6 of the General Statutes, which allows the Board, in its discretion, to adopt rules and regulations to prevent injustices and inequities. This would be a matter for the Board of Trustees to either grant or withhold according to their discretion.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; APPLICATION OF
TWENTY-YEAR RETIREMENT TO PERSONS OVER SIXTY YEARS OF AGE;
FIVE-YEAR VALIDITY PERIOD; PAYMENT OF INACTIVE
ACCOUNTS TO ESCHEATS FUND

3 November 1947

You call attention to subsection 4 of Section 135-3 of the General Statutes which permits persons who separate from service prior to retirement, after completing twenty or more years of creditable service, to retire upon attaining the age of sixty years. This subsection provides that all applications for retirement, under this subsection, must be filed within a period of twelve months from and after the sixtieth birthday of such applicant. This subsection is retroactive in effect and was intended to apply to all persons who had completed twenty or more years of creditable service prior to the passage of the Act. You call attention to the fact that in many cases, members were already over sixty years of age when the law was passed; and, therefore, these persons cannot meet the requirement of filing application for retirement within a period of twelve months from and after their sixtieth birthday. The provision of the Act as to making application for retirement after twenty years of creditable service, which requires application to be made within a period of twelve months after sixtieth birthday of applicant, applies only to those persons who can meet the requirement and who are able to file such application within the required time. It does not apply to those persons who, by reason of their age, cannot meet the requirement. It is, therefore, within the regulatory power of your Board of Trustees to set forth the necessary regulations or standards fixing the time limits within which persons who cannot meet this requirement by reason of their age can be afforded an opportunity to file their applications and avail themselves of the statute. Notice should be sent to such persons and a reasonable length of time allowed in which to file such applications.

Your next question relates to the time from which the five-year validity period should be dated. I think the statute clearly contemplates that you should use the fiscal year in determining this period; and, therefore, members should not be allowed to return as active members after five years from the end of the fiscal year on which they last appeared on the pay roll. The statute is subsection 3 of Section 135-3; and while it does not use the term "fiscal year," nevertheless, Section 135-2 establishes the System as of the first day of July, 1941. It seems to me that this throws the whole System, for nearly all purposes, on the fiscal year basis and that this is the logical unit to use in counting the period of time.

Your last question pertains to the question of inactive accounts of members. You would like to know if inactive accounts, after five years of inactivity, should be paid over to the Escheats Fund of the University in accordance with our laws on escheats. A detailed examination of our law on escheats discloses that our escheats statutes describe and designate various types and kinds of accounts and sums that must be paid over to the Escheats Fund of the University. I do not find, however, in our law on escheats any paragraph or section that describes or designates such an account or accounts as are maintained in the Retirement System. I am of the opinion, therefore, that inactive accounts of the Retirement System which remain inactive for a period of five years or more do not go to the Escheats Fund of the University and that the Board of Trustees of the Retirement System may, by proper order, cause these accounts to be paid into the Pension Accumulation Fund, assuming, of course, that the necessary five years has elapsed, which is the present rule under which you are operating.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; ELIGIBILITY FOR
PRIOR SERVICE; EMPLOYMENT DURING FIVE-YEAR BASIS PERIOD;
ELIGIBILITY OF ELECTRIC MEMBERSHIP CORPORATIONS

29 December 1947

Your first question deals with the eligibility of Mrs. Bonnie Muse Gibson (No. A23445) for prior service under the provisions of the State Employees' Retirement System. It appears that Mrs. Gibson had prior service in the public schools of the State from 1920 through 1935. She became sick in 1935 and was out of school work until the year 1941-42. It further appears from satisfactory evidence from public school officials that Mrs. Gibson would have been teaching every school year had it not been for her illness.

Eligibility for prior service under the Teachers' and State Employees' Retirement System is determined by Section 135-4 of the General Statutes. In general, there are two requirements: (1) A teacher or State employee must have been employed by the State or the public schools at some time during the five years immediately preceding the establishment of the System; and (2) Such teacher or State employee must become a member during the first year of operation of the Retirement System. The Board of Trustees has the power to adopt rules and regulations for the purpose of fixing the eligibility of applicants. The Board can say, by regulations,

how much service in any year is equivalent to one year of service; but the Board cannot, in any case, give credit for more than one year of service for all services in that year.

It is evident from the service record of Mrs. Gibson that she has not been employed or performed any services during the five-year period preceding the establishment of the System. On account of the hardship and sympathies in the matter, I have searched every way possible to find some reasonable basis upon which this woman might be entitled to prior service, but under the present state of the law, I am compelled to say that she has not met the requirements. The attention of yourself and the Board of Trustees is called to subsection 6 of Section 135-6 which says: "The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequities which might otherwise arise in the administration of this chapter."

Your next question relates to the eligibility of electric membership corporations and their employees to be covered by the provisions of the State Employees' Retirement System or the Local Governmental Employees' Retirement System. Electric membership corporations have their legal existence under Article 2 of Chapter 117 of the General Statutes. These corporations are organized to carry out the rural electrification system of the State. Under Section 117-19, they are declared to be public agencies and have within their limits the same rights as any other political subdivision of the State. As to the Teachers' and State Employees' Retirement System, reference to Section 135-1 of the General Statutes will show that these corporations do not come within the definition of an employer nor do their employees come within the definition of the word "employee" as therein contained. The employees of such corporations are not supervised by the Budget Bureau nor are they on the pay roll of the State.

A reference to Article 3 of Chapter 128 of the General Statutes, which creates the Local Governmental Employees' Retirement System, will show that this Retirement System applies only to counties, cities and towns. While it may be that these corporations are public-service agencies, yet they do not come within the scope of coverage and definitions of the State Employees' Retirement System or the Local Governmental Employees' Retirement System; and I am compelled to say, therefore, that they are not entitled to coverage under these Systems. No doubt, these employees should be under the Local Governmental Employees' Retirement System, but it will take an act of the General Assembly to carry this into effect.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; CONDITIONS OF
ELIGIBILITY OF RETIREMENT UPON COMPLETION OF TWENTY YEARS'
SERVICE; SUBSECTION (7) OF SECTION 135-3 OF THE
GENERAL STATUTES

2 January 1948

In your letter, you raise the question as to whether or not Mr. Olin O. Dukes is eligible for retirement under subsection (7) of Section 135-3 of the General Statutes by reason of completion of twenty years of service. You relate the facts in Mr. Duke's case as follows:

"Mr. Olin O. Dukes was employed as a County Agent by State College for 22 years prior to July 1, 1941. He resigned on September 10,

1941 and is now employed as County Agent in Darlington County, South Carolina. Mr. Dukes only contributed \$9.10 to the Retirement System for the period from July 1st through September 10th."

Subsection (7) of Section 135-3 of the General Statutes was passed by the General Assembly of 1947. This same subsection will be found as Section 5 of Chapter 458 of the Session Laws of 1947, and this subsection went into effect, by the express language of the Act, upon its ratification. The Act was ratified on the 25th day of March, 1947. Subsection (7) of Section 135-3 of the General Statutes, I think, should be quoted for the purpose of understanding our views on this question and is as follows:

"(7) Notwithstanding any other provision of this chapter, any member who separates from service prior to retirement after completing twenty or more years of creditable service and who leaves his total accumulated contributions in said system shall have the right to retire upon attaining the age of sixty years, notwithstanding the fact that said member does not have the status of a member in service at the time his application for retirement is filed; and such applicant for retirement shall be entitled to the benefits provided by subsection (2) of section 135-5 of this chapter. All such applications for retirement under this subsection must be filed within a period of twelve months from and after the sixtieth birthday of such applicant."

Now, it is certain that Mr. Dukes became a member of the Teachers' and State Employees' Retirement System and was also a member in service until he left State employment. Mr. Dukes resigned on September 10th, 1941; but notwithstanding his resignation from State service, he still retained his membership in the System by virtue of subsection (3) of Section 135-3 of the General Statutes because he did not withdraw his accumulated contributions, as I am informed; and this retention of membership on his part lasted until he was absent from service for more than five years in a period of six consecutive years after becoming a member of the System. While certain portions of subsection 7 of Section 135-3 are inherently retroactive, such as the counting of creditable service, which includes prior service before the System was established, nevertheless, it was the intent that this subsection would apply only to those persons who had membership in the System. The statute expressly states that: "*Any member* who separates from service prior to retirement after completing twenty years of creditable service, etc.," shall be entitled to the benefits of this provision notwithstanding the fact that he has left service and does not have the status of a member in service. This subsection, therefore, would be applicable only to those persons who at the time of its enactment or effective date were members of the Retirement System. Manifestly, the statute did not intend to go back and reinstate those persons whose membership in the System had ceased to exist because if such had been the intent, the statute would have plainly, in its own words, stated that it would be applicable to members of the System as well as former members of the System.

I am of the opinion, therefore, that when you count the five years in which Mr. Dukes retained his membership, if the twenty-fifth day of March, 1947 (the effective date of the Act) falls within this five years in

which Mr. Dukes still retained his membership, then he would be eligible to retire under this subsection and would have the benefit of same. Otherwise, his membership would have ceased to exist; and he would not be entitled to the advantages of this subsection. What I have said in regard to his case would, I think, apply equally to all classes of persons who make application for the benefits of this subsection. Since the Teachers' and State Employees' Retirement System was established as of July 1st, 1941, it seems to me that all of our calculations and computations of time, as related to the Retirement System, would be on a fiscal-year basis; and in counting this time, I assume that you will calculate your number of years on the fiscal-year basis as the statute seems to contemplate.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; EMPLOYER
UNDER THE ACT; AGENCIES OF THE STATE; NORTH CAROLINA
SYMPHONY SOCIETY

18 February 1948

You inquire if the North Carolina Symphony Society, Incorporated is such an agency of the State that its employees would be covered by the Act setting up and controlling the Teachers' and State Employees' Retirement System. In other words, would this Corporation be considered as an "employer" within the provisions of the Act.

The North Carolina Symphony Society, Incorporated was organized as a non-stock corporation on or about January 23rd, 1932. Its principal office is in Chapel Hill, and it was organized to foster musical culture with the authority to organize the North Carolina Symphony Orchestra or other orchestras. It is authorized to train musicians, conduct concerts, lectures and instructions. There is no capital stock, and membership is open to all persons interested in music. There is attached to the original charter a long list of charter members. The certificate of incorporation provides for a board of directors of not less than twelve persons, and the Corporation is governed by this board of directors in conjunction with an executive committee of not less than three persons. The directors, by a majority vote, can make and promulgate by-laws for the government of the Corporation.

Chapter 755 of the Session Laws of 1943 set up a board of directors of sixteen members for this Corporation and provided that the Governor of the State and the Superintendent of Public Instruction should be ex-officio members and that the Governor could appoint four other members. The remaining ten directors are to be appointed by the members of the Corporation. It was made the duty of the State Auditor to make an annual audit of the accounts of the Corporation and to make a report to the General Assembly at each of its regular sessions. It was also stated in this Act that the Society would be under the patronage and control of the State. The expenditures made by the Society are subject to the Executive Budget Act of the State. In 1947, the General Assembly made certain small amendments with reference to the directors, changing the directors to trustees and destroying the limitation of ten remaining members so that the Society could appoint any remaining number of trustees as it should determine.

Under Article VIII, Section 1 of the Constitution, the Legislature had to place this Corporation under the patronage and control of the State in order to be able to give the Corporation grants-in-aid or funds from State monies; but I do not think that this changes the nature of the Corporation in the sense that it makes it a State agency. Likewise, the Act of 1943 placed the expenditures under the Executive Budget Act of the State and subjected its accounts to the supervisory power of the State Auditor so that the State could have an account of the monies appropriated for the benefit of the Corporation. It should be pointed out that the State gives aid to several classes of institutions that are not State agencies. I might point out that the State gives grants-in-aid to the Oxford Orphanage, the Junior Order Orphanage and the Pythian Orphanage and other types of beneficial institutions just as it does this Corporation; but no one would contend that these institutions are State agencies or that they are converted into State agencies because they receive some financial assistance from the State. A State agency exercises some of the sovereign powers of the State Government, and I do not think that it can be said that the North Carolina Symphony Society, Incorporated exercises any sovereign powers whatsoever. It is simply a beneficial organization interested in musical culture which the State wishes to foster by financial assistance, and I cannot find anything that this agency does of a governmental or sovereign nature. Its only connection with the State is financial with the power, on the part of the State, to examine its accounts and see if the State's monies have been properly expended.

I am of the opinion, therefore, that the North Carolina Symphony Society, Incorporated is not a State agency and is not an "employer" within the meaning of the Teachers' and State Employees' Retirement Act.

LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM; EMPLOYER; EMPLOYEES; ELIGIBILITY OF EMPLOYEES OF DISTRICT BOARDS OF HEALTH.

22 March 1948

You call attention to the statute creating and authorizing the Local Governmental Employees' Retirement System, and you state your question as follows:

"The question that I wish to have answered is pertaining to the Tri- and Bi-County Health Departments who wish to become members of the Retirement System. Under the provisions of this act is it possible for the Board of County Commissioners and the County Boards of Health by the resolution adopted permit the Boards of Health in two or more Counties to come in as separate Units to the Local Governmental Employees' Retirement System?"

Subsection 1 of Section 128-23 and also subsection 2 of Section 128-23 of the General Statutes provides that cities, towns and counties may, by resolution legally adopted and approved by the Board of Trustees, elect to have their employees participate in this Retirement System. When this resolution is accepted by the Board of Trustees, the employer must make the contributions required of participating employers and must deduct

from the salaries of employees, when they become members, the contributions required of members. Section 128-24 defines membership that must prevail in the System when a county, city or town elects to become an employer. You will there find that all employees entering or re-entering the service of a participating county, city or town after the date of participation in the System must be members; and furthermore, all persons who are employees at the time of participation must be members except those employees who notify the Board of Trustees in writing on or before ninety days following the date of participation in the System by such county, city or town. It is true also that there is a proviso in subsection 2 of Section 128-24, dealing with membership, which is as follows:

"PROVIDED, further, that employees of welfare or health departments whose compensation is derived from both state and local funds may be members of a North Carolina Local Governmental Employees' Retirement System to the extent of that part of their compensation derived from a county, city or town."

This whole statute contemplates that if a county, city or town becomes an employer that all of its employees will be covered under the Act except those who signify their intention to be not so covered within the ninety-day period. The proviso permits health department employees to be considered as employees under the Act to the extent of their compensation derived from a county, city or town: that is, with this limitation, they may be treated as employees; but the counties, cities and towns who pay part of the compensation to the health department employees must, at the same time, be employers.

A health department of a county or a district health department composed of several counties cannot be an employer under the System because health departments are not defined as employers under the System; and the statute specifically limits employers to counties, cities and towns. It follows, therefore, that no health department can come into the System as an employer distinct and apart from some county, city or town. If we assume a tri-county health unit, it may be that all three counties are employers under the System, and there would, therefore, be no question; but if we assume that only one county is an employer under the System, it would only be required to contribute on a health department employee to the extent of its pro-rata share of such employee's salary; and as a practical matter in most cases, this would scarcely be worthwhile.

I am, therefore, compelled to answer your question in the negative, and that is, boards of health cannot come into the Retirement System as separate units; and in the example put by you, where Caldwell County is a member of the System, the Board of Health and the Board of Commissioners of McDowell and Burke Counties cannot enter into an agreement bringing the Tri-County Health Department under the Retirement System by adopting a resolution and designating the Board of Health as an employer. The only way this could be accomplished under the framework of the present Act would be for all three of the counties to become employers under the law.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; EMPLOYEES;
COMPULSORY RETIREMENT OF EMPLOYEES ELECTED TO OFFICE;
LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM; COM-
PULSORY RETIREMENT OF EMPLOYEES ELECTED TO OFFICE

30 March 1948

Your question relates to the retirement of elected officials more than seventy years of age. You would like to know if the Board of Trustees of the Teachers' and State Employees' Retirement System and the Board of Trustees of the Local Governmental Employees' Retirement System have authority, under these Retirement Acts, to compel public employees elected to their positions by the voters of cities, counties or State to retire upon reaching the age of seventy years. You state the example of a man elected to a county office at the age of sixty-nine; but upon reaching the age seventy, the Board of Trustees would be in a position to retire this individual if he were not an elected official. You would like to know if the Boards of Trustees can compel an elected official to retire upon reaching compulsory retirement age.

I think the answer to your question is that the Board of Trustees in either System does not have the authority to compel the retirement of an elected official even though such official is an "employee" as the term is defined in the two Retirement Acts. The Constitution of this State, Article VII, Section 7, fixes the conditions of eligibility to hold office in this State; and this is, any person can hold office who is a voter or elector. The age qualification there is twenty-one years of age; and if you had the power, that is the two Boards of Trustees had the power, to compel a person to retire from public office upon reaching the age of seventy, then you would be annexing another age qualification to the right to hold office. This you cannot do. It is my opinion, therefore, that such a person cannot be compelled to retire. Such person should be carried as an employee with deductions from his salary as usual; but, of course, the State, or the county, city or town would cease to match deductions at the age fixed by the statute when such matching ceases. When such person ceases to hold office, they can apply for retirement.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; INTERPRETATION
OF G. S. SECTION 135-14

30 April 1948

You call attention to the first paragraph of Section 135-14, and particularly that portion or phrase which reads: "or is now by reason of physical disability unable to teach." You then state your question as follows:

"The question that I want clarified is the section '*is now by reason of physical disability unable to teach.*' Do you interpret that to mean at the present time or at the time the act was passed? The question has arisen and we have some applications for retirement with 20 years of service or more who would be eligible for retirement if this section is to be interpreted '*at the present time.*' "

This portion of the Retirement System Act is Chapter 785 of the Session Laws of 1943. In our opinion, it intended to provide for those teachers who were sixty-five years old or more on the 10th day of March, 1943, or if such teacher was then, at that time, physically unable to teach. In other words, the "now" refers to the physical status of the teacher at the time of the passage of the Act. The Act became effective on the 10th day of March, 1943. If the Legislature had intended to provide for teachers who were not then physically unfit but who might in the future become physically disabled, it would have added the phrase, after the word "now", such as "or who may in the future or hereafter become". Since the Legislature did not see fit to take care of future cases by its language, there is only one possible conclusion; and, that is, it was intended to take care of those who at the time of the passage of the Act were physically unable to perform their duties as teachers.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM; ACCOUNTING
SYSTEM; NECESSITY OF SEPARATING FUNDS IN THE ANNUITY SAVINGS
FUND AND PENSION ACCUMULATION FUND; ACCOUNTING FOR AND
TREATING THE ASSETS OF THE RETIREMENT SYSTEM AS A WHOLE
RATHER THAN ASSETS OF SEPARATE FUND ACCOUNTS

15 June 1948

You call attention to the fact that in handling the assets of the Teachers' and State Employees' Retirement System, they are using a system of fund accounting with interest on investments credited to the accounts of the various funds and the cash account for each fund. This results in a great deal of extra work from the accountant's viewpoint and considerable loss of time in transferring funds from one account to another because the funds are operated on a separate account basis; and State vouchers must be drawn and sent through the regular accounting procedures and fiscal system of the State in order to transfer funds from one account to the other. This system, no doubt, was derived from the fact that various accounts in the Retirement System bear such names as "Annuity Savings Fund," and "Pension Accumulation Fund." There was an inference, no doubt, from the use of these names that specific cash accounts had to be kept for these funds in a separate manner and that these accounts or the cash represented by such accounts could not be comingled with the other assets of the Retirement System.

You inquire of this office if it would be lawful to consider the Annuity Savings Fund, the Annuity Reserve Fund, the Pension Accumulation Fund, the Pension Reserve Fund and the Expense Fund merely as book accounts set up to keep track of transactions involving the receipts and disbursements of monies and transfers of reserves on the books of the System and to consider that the assets of the Retirement System should be treated as a whole rather than the assets of separate fund accounts.

If this system can be adopted, it would save much trouble and time in transferring funds from one account to the other and would greatly simplify the accounting procedures not only in your office but in the offices of the State Auditor and State Treasurer. I have talked with Mr. Deyton, the Assistant Director of the Budget, Mr. Bridges, the State Auditor, and

Mr. Parker of the State Treasurer's office. All of these gentlemen agree that if such a system were adopted, the handling of the accounts and the vouchers of the System and the accounting procedures used in the Auditor's office and in the Treasurer's office would be just as rigid, efficient and competent as is now being done under the present system. In other words, it would not lessen any of the auditing safeguards of the Retirement System for the protection of its funds. The State Auditor, as well as the other gentlemen that I have consulted, agree that from an auditing and accounting standpoint, it would be much better if you operated on the basis stated in your question.

I am of the opinion that there is no legal obstacle or prohibition which would prevent you from setting up this system of accounting and handling the assets of the Retirement System. The fact that the word "fund" is attached to several of these accounts does not mean that separate cash accounts must be kept for each fund and that vouchers must be drawn before funds can be transferred from one account to the other. There is nothing in the Teachers' and State Employees' Retirement System Law that requires such a procedure, and I cannot think that the use of the word "fund" legally compels the practice now being followed.

I advise, therefore, that you may treat the assets of the Teachers' and State Employees' Retirement System as a whole and that you do not have to have separate cash accounts for each one of the funds created by the System. Of course, these funds will be set up on your books as separate funds; but you can transfer from one fund to another as bookkeeping transactions without using the device of separate cash accounts. I, therefore, answer your question in the affirmative that you can adopt such a system of accounting, which as I understand, has already been approved by the Assistant Director of the Budget, State Auditor and the State Treasurer's office, subject to this letter of advice on the legal questions.

OPINIONS TO STATE BOARD OF PUBLIC WELFARE

ADOPTION LAW; ADOPTION OF A CHILD BY SECOND PETITIONER AFTER ISSUANCE OF INTERLOCUTORY ORDER AS TO FIRST PETITIONER

16 July 1946

You state that recently your attention has been called to some adoption proceedings in which the mother petitioner has married during the final period of trial placement and her husband, prior to the issuance of the final order, seeks to join her in the adoption of the child by means of a special petition before the court. You state that in these cases the second petitioner requests that his surname be made the new legal name of the child. In making such request the second petitioner has presented an affidavit as to his wish to assume the relations of a father, and to adopt the minor as his own child. Your question is as follows:

Will you please advise us if this procedure is permitted under provisions of Chapter 48, Sections 1 through 15, or is it advisable for the original adoption proceeding to be revoked with a new proceeding initiated in which the second petitioner will join with the original petitioner in filing a petition to adopt on the standard form supplied by the State Board of Public Welfare?

I don't think that the writer, or anyone else, can give a final and authoritative answer to your question, since the matter has not been passed upon by the Supreme Court of North Carolina, and I have been unable to find any authority in foreign jurisdictions.

Adoption proceedings are purely statutory since adoption was unknown at common law, and Chapter 48 of the General Statutes of North Carolina does not provide, permit or allow such an amendment to the proceedings admitting a second petitioner to the proceeding, as set forth in your letter. As you know it is the ruling of our Supreme Court that adoption statutes must be construed strictly.

It seems to me that when you introduce a second petitioner into an adoption proceeding that has already been instituted and which has progressed so far that an interlocutory order has been signed, that you are attempting to change the whole nature of the proceeding. This office has heretofore ruled that when a child is adopted by a husband and wife they must be joint petitioners, or in other words, we do not think that a wife can adopt a child alone and without the husband joining in the petition with her. When the status of husband and wife exist the original petition must be filed jointly and service of process on parties, consent, and other proceedings must be in contemplation that the parties are husband and wife. The introduction of a second petitioner to my mind invalidates the investigation and report made by the Superintendent of Public Welfare, since he did not know when the original report was made that a husband would be involved in the adoption. No one can tell whether or not the nature of the home will be the same when the husband enters into the situation.

It is true that the last part of Section 48-1 provides that a husband or wife can be made a party to an adoption proceeding as a petitioner when the name of one of them is unintentionally omitted when the original petition was filed. It is plain, however, that the type of amendment allowed under this part of that section contemplates a situation where the relation of husband and wife already existed when the original petition was filed, but through mistake or inadvertence, either the husband or wife was omitted and did not join in the original petition although it was the purpose of the omitted person to be joined in the petition. It seems to me, therefore, that if the Legislature intended for a second petitioner to be introduced into an adoption proceeding after the petition was filed, then it would have said so. I am greatly impressed by the fact that provision is made for amendment where the parties are already married at the time of the filing of the original petition, but no provision for amendment is made where one of the parties files the original petition and subsequently marries after the adoption proceeding has progressed to a certain stage.

While I cannot be sure, as I have heretofore said, nevertheless, I am strongly of the opinion that under the existing state of our law on adoption, such amendment should not be attempted, and that there is grave doubts as to its validity. It seems to me that if I were a practicing attorney, engaged in general practice, that I would file a new petition and start all over again in order to be sure. I would not want to take the risk of proceeding by amendment, and then many years later have the adoption proceeding set aside and be declared void; this we know has happened in many adoption proceedings as the records of our Supreme Court show.

I have grave doubts of the validity of proceeding by amendment and advise that it should not be done.

**MERIT SYSTEM COUNCIL ACT 1941 COVERING JUVENILE COURT WORKERS
UNDER THE SUPERVISION OF THE SUPERINTENDENT OF PUBLIC WELFARE;
SALARIES OF SUCH EMPLOYEES PAID BY CITY AND COUNTY FUNDS**

23 July 1946

In your letter of July 12, 1946 you call attention to Sections 110-31 and 110-43 under which statutes the superintendent of public welfare of a county is the chief probation officer with the duty of supervising all probation officers connected with juvenile courts, both city and county, within the county.

Your letter states as follows:

"We have been requested to advise on administrative policies regarding the establishment of probation or case work services for delinquents within the county department of public welfare, which services are to be rendered to the county juvenile court under the direct supervision of the superintendent of public welfare and programmed within the child welfare division of his department.

"The employees in question are to be selected from merit system registers covering such job classifications with salary ranges established under the rules and regulations of the merit system. However, the compensation itself is to be paid directly from city and county

funds budgeted to care for the cost of the juvenile court of the particular county. This court is a combined city and county court established as provided by statute.

"Specifically our question is this: where juvenile court workers, selected from the merit system register and meeting all merit system requirements as to job classifications and salary schedules, are to be placed within the welfare department under the direct supervision of the superintendent of public welfare, would the payment of the salaries of such workers out of city and county funds and not from the administrative budget of the welfare department be permitted under the merit system?"

I have discussed this question with Mr. Miller; and no doubt he has informed you of the conclusions that we reached in this matter. The basic difficulty is that the employees mentioned in your letter, assistant probation officers, are employed and appointed by an appointing authority which said appointing authority is not embraced within the scope of coverage of the Merit System Law. The fact remains that under the present statutory system, assistant probation officers are not and can never be considered as employees of the county welfare department regardless of the methods or machinery provided for the expenditure of funds. In my former letter dealing with the expenditure and payment of funds to the employees of the county welfare system, I did stress the source of funds; but in that instance, I was dealing with employees definitely covered by the Merit System Act, and my remarks as to source of funds must be construed and applied to that frame of reference. The agency paying an employee cannot be the sole criterion where there are positive statutes to the contrary.

I did agree with Mr. Miller to the effect that there was nothing to prohibit the Merit System Council from setting up examinations, maintaining registers, job classifications and appointing these assistant probation officers from these registers provided that it is expressly understood that this is done by mutual agreement with all parties concerned. The appointing authority in this instance would agree that he or it would appoint only from these registers, and your agency would agree that it would approve only from these registers. Employees asking to be admitted to examinations would expressly agree in their applications that they would be bound by this contractual system. This in essence is a merit system set up by agreement, and it should be distinctly understood is not an official statutory merit system as provided by the Merit System Law. Under the present condition of the juvenile court statutes, I do not see how I can go any further on this proposition. I suggest an amendment to the Merit System Law incorporating these assistant probation officers within its scope of coverage.

PUBLIC SOLICITING BY CHARITABLE ORGANIZATIONS; BOY SCOUTS OF AMERICA AND ORGANIZATIONS OF SIMILAR NATURE

12 August 1946

In your letter of the 1st of August, 1946, you inquire if the Boy Scouts of America, and organizations of similar nature, are such organizations as are required to be licensed before the individual members thereof can solicit funds for charitable purposes within the purview of Chapter 108,

Sections 80, et seq. The reasons cited by the executive of the district council of the Boy Scouts of America to the effect that the Boy Scouts are not a charitable organization, within the meaning of the statute, but is an organization which has been recognized as a character building one are noted.

The sections referred to provide that all organizations, institutions, or associations formed outside the State of North Carolina for charitable purposes, who through agents or representatives or by mail publicly solicit and receive public donations or sell memberships in this State shall be required to file with the State Board of Charities and Public Welfare a statement setting forth the name and location of such organization, institution or association, the purposes for which said organization exists, the names of its principal officers and soliciting agents, the purposes for which the money solicited is to be expended and the terms under which solicitors are employed. Section 85 of the Act provides that applicants desiring to solicit alms publicly, and all other organizations, institutions or associations desiring to solicit public aid for charitable purposes shall make application to the State Board of Charities and Public Welfare, and if the application is approved the State Board of Charities and Public Welfare shall issue a license to the said individual or to the said organization, without expense, authorizing said individual or said organization to publicly solicit alms or to publicly solicit and receive public donations in any county, city or township in the State.

The question, of course, as to whether or not the Boy Scouts of America, and other similar organizations, are such organizations as are required to secure the license provided for in the Act turns upon whether or not such organizations are charitable.

Briefly stated the test in determining whether or not a particular organization is charitable is whether it exists to carry out a purpose recognized in law as charitable or whether it is maintained for gain, profit, or private advantage. 14 C. J. S., Charities, Section 2, p. 416. Thus, within the meaning of tax exemption statutes, the Boy Scouts of America has been held to be an organization for charitable purposes. *CHARTER OAK COUNCIL, BOY SCOUTS OF AMERICA v. TOWN OF NEW HARTFORD*, 185 A. 575 (Conn.); *THORPE v. CENTRAL GEORGIA COUNCIL, BOY SCOUTS OF AMERICA*, 196 S. E. 762, (Ga); 116 A. L. R. 373; *CAMDEN COUNTY COUNCIL, BOY SCOUTS OF AMERICA v. BUCKS COUNTY*, 13 Pa. D. & C. 213. In like manner Young Men's Christian Association has been held to be a charitable organization. *LITTLE v. CITY OF NEWBURYPORT*, 96 N. E. 1032 (Mass.); *IN RE YOUNG MEN'S CHRISTIAN ASSOCIATION*, Assessment, 182 N. W. 593 (Neb.). Holdings are the same with reference to Young Women's Christian Associations. *Y. M. C. A. v. Portsmouth*, 192 A. 617 (New Hampshire).

In actions for negligence of its agents the Boy Scouts of America has been held to be a charitable institution. *YOUNG v. BOY SCOUTS OF AMERICA*, 51 Pac., Second 191 (Cal.). The same is true of Young Men's Christian Associations; *EMERICK v. PENNSYLVANIA RAILROAD* *Y. M. C. A. OF CRESTLINE*, 43 N. E. 2 (d) 733 (Ohio); as well as Young Women's Christian Associations; *EADS v. Y. W. C. A.* 29 S. W. 2(d) 701 (Mo.). A gift to the Boy Scouts of America is a gift for char-

itable purposes. *TILLINGHAST v. COUNCIL AT NARRAGANSETT PIER*, 133 A. 662 (R. I.). Again holdings are the same in the case of Young Men's Christian Associations. *PENNSYLVANIA v. Y.M.C.A.*, 17 A. 475 (Pa.); *GIBSON v. FRYE INSTITUTE*, 193 S. W. 1059 (Tenn.); *ANDREWS v. Y.M.C.A. of DES MOINES*, 284 N. W. 186 (Iowa).

It seems that the same rules will apply to Girl Scouts as to Boy Scouts. Some of the cases cited above involve an interpretation of statutes which specify "charitable organizations and institutions" or "charitable purposes" in the same manner as specified in G. S. 108-80, et seq. Therefore, it seems that according to the authorities, Boy Scouts, Girl Scouts, Y.M.C.A.s and Y.W.C.A.s would be considered as charitable organizations, organized for charitable purposes within the meaning of these sections.

Regardless of the contention of the executive of the district council of the Boy Scouts of America, you are advised that for the purposes of the statute requiring a license for carrying on the activities by the Boy Scouts of America, and other similar organizations, they are, and must be so considered, ones which must be licensed in the manner provided for in the statute above referred to.

NECESSARY EXPENSES; MAINTENANCE AND OPERATION OF HOSPITALS;
CONTRIBUTIONS PRIVATE HOSPITALS

12 August 1946

I received your letter in which you state that it is proposed that several of the western counties of the State make contributions varying from \$500 to \$2,000 for the erection of an annex to the building of a private institution, to be used in the hospitalization of polio patients from the interested counties, and that the cost of equipment, staff, and maintenance of patients is to be paid by a national foundation.

"The query is: May a county board of commissioners, under the provisions of Chapter 153, Articles 8 through 13 of the General Statutes of North Carolina, lawfully appropriate tax funds to a private institution for the purpose of assisting in the erection of a building on the property of the private institution, said building to be owned and operated by said private institution with the understanding that in turn the said private institution will accept and care for its polio patients without further appropriation by the said county board of commissioners."

In the cases of *PALMER v. HAYWOOD COUNTY*, 212 N. C. 284, and *NASH v. MONROE*, 198 N. C. 306, the Supreme Court of North Carolina held "the building, maintenance, and operation of public hospitals is not a necessary expense."

Certainly if the building, maintenance, and operation of a public hospital is not a necessary expense, it cannot be successfully contended that the building or erection of an annex to a private hospital is a necessary expense. I am, therefore, of the opinion that the interested counties may not contribute or appropriate tax funds for the purposes mentioned in your letter without first holding an election as provided for in Sections 131-4 through 131-33 of the General Statutes of North Carolina.

I have given considerable thought to the application of the principles announced in *MARTIN v. COUNTY COMMISSIONERS OF WAKE COUNTY*, 208 N. C. 354, in which the court upheld a contract between the county and Rex Hospital in which the County agreed to pay certain stipulated sums over a period of years to the hospital for necessary medical care and hospitalization of the indigent sick of the county. But, upon examination of the Statutes upon which the Martin case was based, I find that several of the counties of the State were exempted so that such counties could not enter into contracts similar to the one involving Wake County, unless such act was amended by legislative action.

STATE BOARD OF PUBLIC WELFARE; ORGANIZATIONS SOLICITING ALMS AND
CHARITABLE DONATIONS; ORGANIZATIONS REQUIRED TO FILE STATEMENTS
WITH AND OBTAIN LICENSES FROM STATE BOARD OF PUBLIC WELFARE;
APPLICATION OF ARTICLE 5 OF CHAPTER 108 OF THE GENERAL
STATUTES TO THE SALVATION ARMY

28 September 1946

The unit of the Salvation Army with which we are dealing in this letter appears to have been incorporated in the State of Georgia; and on or about February 20 or 27, 1927, this corporation filed its charter with the Secretary of State of North Carolina, became domesticated in this State and was thereby authorized to conduct its affairs in this State in accordance with the objectives of the organization.

It appears that the Salvation Army was included as a member organization in the United or Community Chest drive in World War I. It was also a member organization of the drives conducted under the auspices of the National and State United War Fund Committees of World War II. In the intervening period between World War I and World War II, the Salvation Army has been a member of other Community Chest organizations in localities where such organizations existed. In addition, the Salvation Army in other communities has conducted independent annual drives for charitable purposes and has made solicitations from the public at large for its social work and charitable purposes, including maintenance and operation of maternity homes, children's homes, homes for transients, and distribution of Christmas presents to the poor. The records of the organization in the files of the Board of Public Welfare show that solicitations by this organization are made in one county for a State-wide or district program or project in another county.

The certificate of incorporation of the Salvation Army as filed with the Secretary of State of North Carolina, among other things, shows the following objectives:

"That the further purpose for which this corporation is formed is the administration of the temporalities and the management of the property and estate in the State of Georgia of said branch of the Christian Church known as The Salvation Army, and to engage in religious, in charitable, in educational, in missionary, in philanthropic work and particularly in religious, in charitable, educational, missionary and philanthropic work of the character that has been and is being conducted by the branch of the Christian Church known as The Salva-

tion Army and to do everything and to act and carry on every kind of operation necessary and incidental to the maintenance of such religious, beneficial, charitable, educational, missionary and philanthropic work, but all of such work shall be conducted not for pecuniary gain or profit."

Information sent to your office from the National Budget Committee which is sponsored by the Community Chests and Councils, Inc., which is a national organization, with reference to the nature and status of the Salvation Army, is as follows:

"In our view The Salvation Army's activities covered by their general public campaigns are to be viewed as those of a charitable organization. That also was the view of the President's War Relief Control Board which accepted the registration of the Salvation Army as a war relief agency, though 'established religious bodies not independently carrying war relief activities' were exempt from the registration requirements."

The Salvation Army has apparently formulated plans for a six million dollar National campaign for the year 1946; and on this subject, I quote from your letter as follows:

"Moreover, we are informed by this same Committee that the Salvation Army lists in its plans for the six million dollar National campaign for 1946 the following projects: Post-war services, education and training program, officers' retirement fund, national prison and police court work, other services including rural extension program, and building program. The description of the building program is 'adequate building and program facilities for the conducting of our religious, welfare, health, educational and character building activities.'"

In view of the history of this organization and its method of securing community support for its social service program and charitable purposes, considering the nature and extent of its social service program and the fact that a proportion of its intake or income from solicitations is forwarded to the National Office from the local corps or organization, and considering the interpretation of the nature of the Salvation Army program as reflected in the policies of the National Community Chests and Councils and the interpretation of the President's War Relief Control Board, you request an opinion from this office as to whether the provisions of Article 5 of Chapter 108, dealing with the regulation of organizations and individuals soliciting public alms, are applicable to the Salvation Army with reference to its public solicitations of alms and charitable donations in the State of North Carolina.

Our act regulating organizations and individuals soliciting public alms was passed by the General Assembly of 1939 and appears as Chapter 144 of the Public Laws of 1939. This act has been brought forward in the official Code of North Carolina and appears in the official Code as Article 5 of Chapter 108 of the General Statutes of North Carolina, beginning with Section 108-80 and extending through Section 108-90. While the framework and structure of this statute is rather amorphous in style and content and while it is admitted that the statute is not entirely clear in

its words and sentence structure, nevertheless, the purpose, scope and coverage of the statute seems to require that all organizations, both foreign and domestic, shall file statement of their purposes, location, names of principle officers and soliciting agents, and the purpose for which the solicited money is to be expended with the State Board of Public Welfare; and upon consideration of this and other pertinent information, this Board may or may not issue a permit or a license for the solicitation of alms and charitable donations by said organizations. Licenses for blind persons, crippled persons and others eligible for vocational rehabilitation and licenses for deaf persons are issued or refused by the respective State agencies administering the affairs of these persons. Certain exemptions are set forth in this Act, one of which will be discussed later on in this letter. Assuming that an organization shows from the material filed with its application or such other material as may be required by the State Board of Public Welfare that it is a *bona fide* charitable organization soliciting alms and public charitable donations for worthy objects and programs, a license is then issued to the organization; and this organization in turn is required to furnish to each of its soliciting agents a copy of the license of the organization, and attached to such copy of said license there must be affixed a photograph of the individual soliciting agent made within the past twelve months; and this photograph must be attested and countersigned by one of the officials of the organization named in the statute with a certificate to the effect that such agent is authorized by the organization to publicly solicit alms and receive donations for same.

The right of the State and subdivisions of the State to reasonably regulate the solicitation of alms and charitable donations has been upheld in our State by the Supreme Court in the case of *STATE v. HUNDLEY, ET AL*, 195 N. C. 377. In this case the Supreme Court had before it an ordinance of the City of Charlotte which read as follows:

“Section 1. It shall be unlawful for any person to engage in the business of soliciting alms, or begging charity, for his or her own livelihood, or for any charitable purpose, upon the streets of the city of Charlotte, or in any public place within the corporate limits of the city of Charlotte, without first securing a permit from the governing body of the city of Charlotte to engage in such business.

“Section 2. Any person desiring to engage in the business of begging, or soliciting alms, shall file with the governing body of the city of Charlotte an application for a permit, which permit shall state the name of the person who makes the application, the purpose for which alms or charity are to be solicited, and the manner in which said funds are to be disbursed, and the governing body of the city of Charlotte shall not issue a permit, as provided herein, to any person unless the said governing body shall be satisfied that the said applicant is a person worthy of assistance or help from the citizens of Charlotte, or that the cause said applicant represents is a worthy cause, and that the funds to be solicited will be properly disbursed.”

The defendants were representatives of the American Rescue Workers, Inc., and much of the defendants' solicitations were carried on by the use of the streets of the cities of the State. It was held that this ordinance was not unreasonable and did not confer arbitrary power with respect to the enforcement of its provisions. It was further held that the ordinance

did not deprive the defendants of their religious liberties or obstruct them in the pursuit of happiness; and, therefore, the ordinance was valid.

The object of our statute, of course, is to prevent unscrupulous, unworthy and designing persons in organizations from collecting funds from the people of the State and converting these funds to their own uses knowing at the time that none of the funds solicited would ever be applied to any worthy or charitable objective. The State simply recognized the fact that many swindlers, racketeers, and confidence men clothe themselves in the garments of charity and Christianity and impose on the citizens of the State by soliciting funds under false pretenses. It was never the intention of the State to suppress the solicitations of any *bona fide* organization, and the history of the administration of the statute shows that no worthy persons or organizations have suffered from its administration. It is true that the provisions of the statute do not apply to solicitations made in a public religious, charitable or educational service or in a meeting of any lodge, church, or Sunday School and to solicitations made by the American Legion and other patriotic organizations. Note that this exemption applies to solicitations made in meetings or in the progress of service. There is also another exemption which reads as follows:

"Nothing in this article shall apply to any church, religious denomination, civic club, or lodge, which is either located in, resident in, or has communicants or members resident in this state, or their officers, employees or representatives, or to institutions or agencies fostered or promoted by the same."

While it may be true that the strict ecclesiastical activities of the Salvation Army may come within the meaning of some of these exemptions, nevertheless, the Salvation Army in our opinion is vastly much more than a religious organization; and it is our opinion that all of the solicitations of the Salvation Army and the organization itself by reason of the breadth and scope of its activities is subject to the application of this law. The organization should file a statement, obtain a license, and properly equip its solicitors with copies of the license. If it shall be said that certain of the strictly church or religious activities of the Salvation Army fall within the meaning of the above-quoted exemption, nevertheless, the exemption must be limited strictly to those activities; and in our opinion this does not relieve the organization from complying with the provisions of the act because a fraction or a portion of its activities may be exempt. The institutions and agencies fostered or promoted by the organizations named in the exemption must be strictly institutions or agencies for the furtherance of church or denominational work; that is, ecclesiastical matters as such, and this would not include many agencies of the Salvation Army which no doubt have very laudable purposes and objectives and indirectly promote religious purposes; but, nevertheless, such operations are not strictly ecclesiastical. No doubt the Salvation Army is one of the most realistic and practical religious and charitable organizations in the world; but as we see it, this does not relieve it from complying with the requirements of the State. No doubt any application that it makes will be readily granted, but it should make the application.

PUBLIC WELFARE; ADOPTION; CONSENT; CHILD BORN IN WEDLOCK BUT
ALLEGED TO BE ILLEGITIMATE

18 December 1946

On March 12, 1946, you sent this office a letter raising certain questions in connection with the proposed adoption of James Parlier by Doctors James and Belle Palmer. The facts in regard to the proposed adoption, as stated in your letter, are as follows:

"The subject named above is rather involved but it summarizes the facts in the case of a child, the minor subject of adoption. The mother only has signed the consent to the adoption, apparently believing that the divorce decree granted in January, 1944, on the complaint of her husband that 'plaintiff and defendant on the 5th day of July, 1941, separated on the fault of the plaintiff and they have continued to live apart' established as a fact that the minor subject of adoption, born on October 23, 1943, was not the child of the husband. The complaint of the husband states further that the plaintiff and defendant were married on March 8, 1941, and that a child by the name of..... was born in December, 1941, and that the child resides with the mother. No mention is made of the minor subject of adoption born in October, 1943. The question asked in the judgment of divorce, 'Did the plaintiff and defendant separate and live separate and apart for two successive years', is answered in the affirmative."

Upon this state of facts your office inquired if a divorce decree granted in December, 1944, established the fact that the child born in wedlock in October, 1943, was not the child of the mother's husband. If we answered that the mother's husband would not be considered the father of the child, then you asked if the consent of the mother to the adoption would be sufficient. On the 11th of April, 1946, we answered your letter stating in substance that since the child was born in wedlock or at least while the relationship of husband and wife existed between the plaintiff and the defendant in the divorce action, therefore, the husband would be presumed to be the father of the child and that, therefore, the divorce action did not establish that the child was illegitimate. Upon this presumptive state of facts, we said that the consent of the mother alone was not sufficient.

I think that we are in agreement upon the proposition that in this State the clerk of the Superior Court has original jurisdiction over all adoption proceedings; and in this capacity, the clerk acts as a judge and performs judicial duties. I am sure that we are also in agreement that the State Board of Public Welfare and its officials have no control over the judicial functions of a clerk in adoption proceedings nor does the State Board of Public Welfare and its officials attempt to assume any such control. The Welfare Department does make certain reports as required by statute for the information and aid of the clerk in passing on adoption proceedings; however, all final questions, such as the sufficiency of the petition, the making of necessary parties, and the finding that the petitioner or petitioners are suitable and proper persons, the finding that the child is the proper subject for adoption and that the best interest of the child will be served by the adoption, are final questions for the clerk. It is likewise a final question for the clerk as to whether or not sufficient and proper consent has been obtained for the adoption and, likewise, who are the proper per-

sons to give or withhold consent. These are legal questions and issues of fact to be determined by the clerk, and this recital as to the authority of the clerk is not made in this letter because of any disagreement between your office and this office on any primary questions but as a basis for the next paragraph of this letter.

Sometime ago Mr. Patton, who was then Assistant Attorney General, wrote your office a letter in which he stated that a child born in wedlock was presumed to be legitimate; and, therefore, as long as this presumption of legitimacy existed and until the child was declared to be illegitimate by a court of competent jurisdiction, that it would be necessary to have the consent of the presumptive father and the mother also for adoption purposes. As I recall, a short time thereafter you requested this office to advise you as to what would be considered a court of competent jurisdiction for the purpose of having a child declared illegitimate. We answered in substance that we did not know of any court which would entertain an action for that specific purpose, but that the question of legitimacy or illegitimacy usually arose in contests over property rights and was settled by appropriate issues in such actions. The presumption that a child is legitimate when born in wedlock is not an incontestable or irrebuttable presumption. In the case, therefore, that we are considering if the petitioners can satisfy the clerk that there was non-access on the part of the husband during the normal period of time during which the child was conceived and on throughout the period of time until the child was born and if, upon the production of sufficient evidence of this nature, the clerk finds that the husband, or plaintiff in the divorce action, was not the father of the child and makes such an adjudication, then it seems to me he could find that the consent of the mother would be sufficient. I do not say that the complaint in the divorce action is conclusive on the issue, but it is evidence to be considered by the clerk and might be considered by him as sufficient. I would assume that the presumptive father would be made a part of the proceeding, either by actual or constructive service of process. Otherwise, I do not see how such an adjudication would be binding on him. However, that is a question for the clerk and counsel for the petitioners. I am not prepared to say that such a procedure will guarantee a valid adoption since no one can make such an assertion in the absence of a ruling of the Supreme Court. We do not have a ruling on such an issue or question. I do say, however, that if I were clerk of the Superior Court and such a proposition were presented to me and counsel for the petitioners thought that an adoption based upon such an adjudication would be legally sufficient, then I would proceed with the matter and allow the adoption unless some other question arose which is not here presented.

CONSTITUTIONAL LAW; NECESSARY EXPENSES; ERECTION AND REPAIR OF COURTHOUSES

24 January 1947

In your letter of the 8th of January, 1947, you inquire if the cost of the construction and maintenance of a county or municipal jail is a necessary expense within the meaning of Article VII, Section 7, of the Constitution, and if county and municipal authorities may levy a tax for such purposes or issue bonds for the cost of the same without a vote of the people.

It is well settled in this State that the building of a courthouse and jail is a necessary county expense within the meaning of Article VII, Section 7, of the Constitution, and that the approval of a majority of the qualified voters of the county is not required to enable the county commissioners to do so. *HALCOMBE v. COMMISSIONERS*, 89 N. C. 346; *BURGIN v. SMITH*, 151 N. C. 561; *JACKSON v. COMMISSIONERS*, 171 N. C. 379; *HARRELL v. COMMISSIONERS*, 206 N. C. 225.

No special authority has apparently been given by the General Assembly which would authorize the governing bodies of counties to levy a special tax in excess of the fifteen cents (15c) constitutional limitation for the purpose of maintaining or repairing county buildings. However, special authority is given to counties, under the County Finance Act, for the issuance of bonds, and for the levying of taxes for the payment of the principal interest thereon in excess of the fifteen cents (15c) limitation for such purpose.

You further inquire if the Acts of the Legislature as set out in G. S. 153-49 and other sections of the General Statutes give legislative approval for the appropriation of funds for the repair and maintenance of a jail as a special necessary purpose so as not to confine the appropriation to the fifteen cents (15c) general purpose levy.

Our Supreme Court in the case of *HARRELL v. COMMISSIONERS OF WILSON*, 206 N. C. 225-228, quoting from *JACKSON v. COMMISSIONERS*, 171 N. C. 379, said:

"The building of a courthouse is a necessary county expense, and the board has full power, in their sound discretion, to repair the old one or to erect a new one, and in order to do so they may contract such debt as is necessary for the purpose. *VAUGHN v. COMMISSIONERS*, 117 N. C., 429; *BRODNAX v. GROOM*, 64 N. C., 244; *HASKETT v. TYRRELL CO.*, 152 N. C., 714. It should be borne in mind, however, by the county commissioners that while they are clothed with the necessary power to contract such indebtedness, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly."

As stated in answer to your first question, however, special legislative authority has been given to counties to issue bonds and to levy a tax for the payment of principal and interest thereon, under the County Finance Act. I have been unable to find any special legislative authority which would authorize the levying of a tax in excess of the fifteen cents (15c) limitation in the Constitution for the erection or repair of a courthouse or jail without a bond issue. This may be done without a vote of the people, by the issuance of bonds for the payment of the cost of same and the levying of a tax for the payment of principal and interest on said bonds, under authority of the County Finance Act.

With respect to municipalities in this State, you are advised that under G. S. 160-200(4) the governing authorities are authorized to appropriate the money of the city for all lawful purposes, and under subsection (13) of this Section they are authorized to erect, repair, and alter all public buildings.

Under the Municipal Finance Act, G. S. 160-378, municipalities are authorized to issue bonds for any purpose or purposes for which it may raise or appropriate money, except for current expenses.

The Supreme Court of this State has held in the case of *HIGHTOWER v. RALEIGH*, 150 N. C. 569, that a police station and city hall are necessary expenses under Article VII, Section 7, of the Constitution, and that municipalities are authorized to erect or repair a building of this character without submitting the question of their authority to a vote of the people.

Your attention is invited to G. S. 160-402 which limits the tax rate which municipalities may impose to one dollar (\$1.00) on the hundred dollar valuation of property within such municipality. The governing authorities of the municipality would have no authority to levy a tax at a rate in excess of this amount for the purpose of repairing or constructing a jail. They could, however, issue bonds for this purpose and levy a tax for the payment of principal and interest thereon, under authority of G. S. 160-378 referred to above.

JUVENILE COURTS; CRIMINAL LAW; JURISDICTION OF JUVENILE COURT OVER
CHILDREN UNDER FOURTEEN YEARS OF AGE CHARGED WITH MURDER

5 May 1947

You state that you have received from one of the counties information to the effect that two children, ages eleven and twelve, are being detained in jail, charged with first degree murder. The solicitor and juvenile court judge have requested that you obtain a ruling from our office in regard to the procedure to be followed in these cases. Your specific question is as follows:

"Should children under 14 years of age charged with a crime for which the penalty is death be tried in the juvenile courts or should their cases be returnable to the Superior Court and there tried as any adult?"

I think the question is answered by the case of *STATE v. BURNETT*, 179 N. C. 735. In that case two children were charged with murder, both being under ten years of age. The Superior Court gave judgment that the bill should be quashed, and the defendants remanded to the juvenile court to be dealt with pursuant to law. The State appealed to the Supreme Court. Mr. Justice Hoke who wrote the opinion of the Court, among other things, stated the following:

"And, in reference to the disposition of children charged as delinquents by reason of having violated a State or municipal law, and that alone, it is provided in Sec. 9 that a child of 14 years, charged with a felony in which the punishment, as now fixed by law, cannot exceed 10 years, the judge of the juvenile court may, if the case be of a nature to require it, bind such child over to the next term of the Superior Court, it being the clear and necessary inference that, as to children of 14 and upwards, and in case of felonies when the punishment may exceed 10 years, the juvenile department of the Superior Court is without jurisdiction of the offense. And from these provisions we conclude, as ruled by his Honor in the court below, that children under 14 years of age are no longer indictable as criminals, but are, in the cases specified, committed for reformation and primarily to the juvenile department of the Superior Court. . . . At common law, there is a conclusive presumption that a child under 7 years of age is incapable of committing crime, and the same presumption exists to the age of 14, as to

minor offenses. *S. v. PUGH*, 52 N. C., 61. Between 7 and 14, and as to graver crimes, there was also a presumption against the ability to commit them, rebuttable, however, on clear and convincing proof that the child possessed the knowledge and discretion requisite for legal accountability. *The statute in this respect only operates to extend the conclusive presumption, in all cases, to children under 14, and as we have endeavored to show, is clearly within the legislative powers.*" (Italics ours).

I have not been able to find any amendment to the juvenile court law which would in any aspect of the matter change or render void the holding which I have cited above. I am of the opinion, therefore, that children under fourteen years of age cannot be charged with a crime for which the penalty is death; and in all cases in which children under fourteen years of age are charged with crime, the same must be dealt with in the juvenile court according to the practice and procedure governing juvenile courts and as therein provided.

APPROPRIATIONS; ACT OF 1947; APPROPRIATION FOR OLD AGE ASSISTANCE
AND AID TO DEPENDENT CHILDREN

5 June 1947

I received your letter of June 4, in which you write me as follows:

"The 1947 General Assembly in amending the appropriations bill to increase the appropriation for old age assistance from \$1,750,000 a year to \$1,850,000 a year and to increase the appropriation for aid to dependent children from \$650,000 a year to \$690,000 a year amended only Section 1, Title VI. Section 12 of the appropriations bill was not amended to correspond with the amendments to Section 1, Title VI. Therefore, Section 12 reads \$1,750,000 a year for old age assistance and \$650,000 a year for aid to dependent children.

"It will be appreciated, therefore, if you will give us a statement indicating that the appropriation for old age assistance is \$1,850,000 for each year of the biennium and that the appropriation for aid to dependent children is \$690,000 for each year of the biennium."

The Budget Appropriations Bill for the biennium 1947-1949, as introduced in the General Assembly, providing for an appropriation for old age assistance and aid to dependent children under Title VI, State Aid and Obligations, as you state, was amended to increase the amount for old age assistance from \$1,750,000 a year to \$1,850,000 a year for each year of the biennium; and for aid to dependent children from \$650,000 a year to \$690,000 a year for each year of the biennium.

In Section 12 of the Act as introduced, the appropriations so made "are declared to be for such sums which, added to the unexpended balances remaining in the appropriations for the said purposes for the biennium of one thousand nine hundred forty-six—forty-seven at the end of said biennium, shall be equal to the sum of one million seven hundred fifty thousand dollars for each year of the biennium for old age assistance and six hundred fifty thousand dollars for each year of the biennium for aid to dependent children."

It is my opinion that the failure of the General Assembly to change the amount recited in Section 12 of these appropriations was due to inadvertence, and that it was the purpose and intention of the General Assembly,

in making the amendment, to increase the appropriations for these objects and purposes as above stated. The actual appropriation is made under Title VI of the Act; the provisions of Section 12 are mere recitals of the appropriations. In my opinion, the correct interpretation of this statute would be to read into Section 12 the actual appropriations as made by the General Assembly under Title VI, thereby giving recognition to the clear intent of the General Assembly.

JUVENILE COURTS; JURISDICTION OF CHILD PENDING APPEAL

14 June 1947

In your letter of the 9th of June, 1947, you ask the following question:

"When a juvenile court, on a petition of neglect, has entered a judgment taking custody of a child and notice of appeal to the Superior Court has been given, can the juvenile court proceed to take custody of the child under its judgment and protect the welfare of the child pending disposition of appeal?"

G. S. 110-40 is as follows:

"An appeal may be taken from any judgment or order of the juvenile court to the superior court having jurisdiction in the county by the parent or, in case there is no parent, by the guardian, custodian or next friend of any child, or by any adult described in Sections 110-38 and 110-39 of this article whose case has been heard by the juvenile court. Such appeal shall be taken in the manner provided for appeals to the superior court; and written notice of such appeal shall be filed with the juvenile court within five days after the issuance of the judgment or order of such court."

In view of the language of the last sentence in the statute quoted above, it is thought that the answer to your question is contained in Article 27, Section 1-294 of the General Statutes, which is in part as follows:

"When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; . . ."

Our Supreme Court has held that the authority of the lower court terminates upon the perfection of an appeal. *STATE BANK v. TWITTY*, 13 N. C. 386; *PRUETT v. CHARLOTTE POWER CO.*, 167 N. C. 598.

You are advised, therefore, that pending an appeal from an order of the Juvenile Court fixing the status of the child, the judgment fixing such status is inoperative until the appeal is finally determined.

This opinion is in accord with previous opinions of this office.

JUVENILE COURTS; JURISDICTION TO DETERMINE CUSTODY OF CHILDREN
UNDER SIXTEEN YEARS OF AGE

14 June 1947

In your letter of June 11, 1947, you inquire of this office as follows:

"Our specific question therefore is whether the juvenile court can receive a petition for the custody of the child and proceed to hear the same when a controversy regarding such custody is between the mother and father of the child."

On June 20, 1942, Mr. George Patton, who was then Assistant Attorney General, issued an interpretation on this same question at the request of Mr. Ransom S. Averitt, who was then Judge of the Juvenile Court of Winston-Salem, North Carolina. A copy of this letter was sent to Miss Lily E. Mitchell, who was at that time Director of Child Welfare of your Agency. After citing many authorities, Mr. Patton concluded in the last paragraph of his letter as follows:

"From a consideration of the cases hereinbefore referred to and other decisions of the Supreme Court of North Carolina on the subject, it appears to me that Juvenile Courts have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within the county, whose custody is subject to controversy, except in those cases in which the Superior Court acquires jurisdiction under the provisions of Sections 2241 and 1664."

Since Mr. Patton issued this ruling, the Supreme Court of North Carolina, in the case of *IN RE PREVATT*, 223 N. C. 833, has held that where parents are separated but not divorced and voluntarily petition the Juvenile Court for an adjudication as to the custody of a child, such Juvenile Court has jurisdiction. In this case, the Court said:

"Unquestionably, if either of the parents had proceeded in accord with C. S., 2241, by writ of *habeas corpus* to determine the custody of the children, jurisdiction for that purpose would have appertained to that court, to the exclusion of the Juvenile Court. *IN RE HAMILTON*, 182 N. C. 44, 108 S. E. 385; *CLEGG v. CLEGG*, 186 N. C., 28, 118 S. E., 824; *IN RE TENHOPPEN*, 202 N. C. 223, 162 S. E. 619; *McEACHERN, v. McEACHERN*, 210 N. C. 98, 185 S. E. 684. But that is not our case. Here as in *WINNER v. BRICE*, *supra*, the matter was originally brought before the Juvenile Court. Relief was sought in that forum. The parties were present and voluntarily submitted themselves to the jurisdiction of that court with respect to a matter which was within the scope of its power.

"While it was said in *S. v. FERGUSON*, 191 N. C., 668, that the Superior Court, as distinguished from the Juvenile Court, had no jurisdiction to adjudge a child delinquent or neglected, the original jurisdiction in those respects having been conferred on the Juvenile Court by C. S., 5039, it will be observed that this statute does not repeal C. S. 2241, and is not inconsistent therewith. No limitation is placed by this statute upon the jurisdiction previously conferred upon the Superior Court by C. S., 2241 to issue writs of *habeas corpus* and to hear and determine the custody of children of parents separated but not divorced. *CLEGG v. CLEGG*, *supra*. But where the Juvenile Court has by proper proceeding acquired jurisdiction of the parties and of the subject matter of children 'whose custody is subject to controversy,' its adjudication for the welfare of the children must be held effective and binding for that purpose. This is subject, however, to the right of the Superior Court judge to adjudicate the custody of children who come within the purview of C. S., 2241, when the matter is properly presented."

1. Where the parents of a child are separated but not divorced and such parents submit to the jurisdiction of the Juvenile Court and ask for an adjudication as to the custody of a child, the Juvenile Court has jurisdiction to pass upon this question. It is assumed that petition is filed and proper process issues.

2. Under such circumstances, the right of the Juvenile Court to pass upon the question of custody is subject to the jurisdiction of the Superior Court if a proper proceeding is brought to determine the custody of a child by means of the remedy of *habeas corpus* under Article 7 of Chapter 17 of the General Statutes. It would follow as a corollary that if *habeas corpus* proceedings are first begun, then the Superior Court would have jurisdiction of the matter to the exclusion of the Juvenile Court.

3. Where the parents are divorced, the present status of our law strongly indicates that the court granting the divorce has exclusive jurisdiction to determine the custody of children under Section 50-13 of the General Statutes. It is not clear that the Juvenile Court is completely without jurisdiction in this instance; but until the matter is cleared up by a decision of the Supreme Court, I would advise that the Juvenile Courts do not attempt to determine the custody of children where the parents are divorced.

My reasons for advising as stated in Paragraph 3 above is that the Supreme Court of North Carolina had this point before it in the case of *IN RE BLAKE*, 184 N. C. 278. It was there suggested on the argument of the *BLAKE CASE* that if the jurisdiction to pass upon the divorce decree is not exclusively in the court in which the divorce decree was granted, it would be in the Juvenile Court. This point, however, was not decided by the Court.

I think the above states our opinion on the law as related to your question under the decisions of the Supreme Court to date.

ADOPTION; CONSENT ADDRESSED TO CLERK OF COURT OTHER THAN
CLERK OF ADOPTION

24 July 1947

Reference is made to your letter of July 11, 1947, with which you enclose copy of judgment tendered to the Clerk of the Superior Court of Wayne County by the Honorable W. R. Allen, Attorney in the adoption proceeding of Fhala Graham by Edwin and Rachel Patten.

It appears that this child was born on April 5, 1945, in Craven County and placed by a Catholic Priest of Lenoir County in the custody of Mr. and Mrs. Patten. It also appears that consent to adoption was signed by the mother, but this consent was addressed to the Clerk of the Superior Court of Craven County, and appears to have been signed by the mother by the use of a fictitious name. In reviewing the matter the department called attention to the fact that the consent form apparently gave jurisdiction to the Clerk of the Superior Court of Craven County, while all of the other papers of the proceeding were filed in the Clerk's office in Wayne County. The department called attention to the fact that the mother signed the consent before the child was six months of age. The department thought that perhaps a new consent should be obtained, but it was pointed out that it had been impossible to locate the mother for such information and it was suggested that a finding of abandonment be made since the mother could not be located to sign another consent.

You have asked our office to comment on these proceedings especially as to whether or not the present consent form can be used even though a fictitious name was signed and the consent was executed before the child was six months of age.

A review of the present adoption law does not disclose that a consent to adoption is required to be in writing at all, although it is certainly the better practice to have a written consent in the records of the case as positive proof. I think that as to the question of consent it is a finding to be made by the Clerk upon evidence either oral or written. I do not think that the fact that the mother signed a fictitious name makes any difference. The vital question is, did she consent to the adoption of this child, and if she did consent to the adoption, then the fact that she signed a fictitious name cannot void or invalidate such consent.

I am further of the opinion that the fact that the written consent was addressed to the Clerk of the Superior Court of Craven County does not affect the consent in any respect whatsoever. Here again the vital question is did the mother consent to the adoption? So far as addressing the consent to any particular official, she might as well have addressed it to the President of the United States, and still the consent would be valid.

As to the consent being signed before the child was six months of age, I do not think that this makes any difference. The separation of a child from its mother before it is six months of age is a penal statute which makes it a crime for such separation to take place unless consent or permission is given by certain officials. I don't think this affects the consent, nor do I think it affects the question of adoption. It is my opinion that if the Clerk of Superior Court is satisfied that the consent was actually given by the mother, he should proceed with the adoption irrespective of the form of consent. I think that the judgment should be reformed along the lines of a regular adoption with written consent, and frankly, I see no need of a finding of abandonment in this case.

ADOPTIONS; SURRENDER OF CHILD TO SUPERINTENDENT OF PUBLIC WELFARE
OF COUNTY IN WHICH CHILD BORN, WHERE PARENTS HAVE RESIDENCE
IN ANOTHER COUNTY

8 September 1947

In your letter of August 15, 1947, you inquire if parents, or a parent, by surrender affidavit, can surrender a child to a county superintendent of public welfare of the county in which the child is born, where the parents, or parent, have residence in another county.

The provisions as to the surrender of a child by a written instrument to a county superintendent of public welfare are found in Section 48-5 of the General Statutes, which is our chapter dealing with the adoption of minors. A review of this whole chapter leads me to the conclusion that the provisions providing for the surrender of a child to "the superintendent of public welfare of the county," refer to the county in which the adoption proceedings were instituted. A careful and detailed search of the language in this whole chapter fails to reveal any requirement that the surrender must be made to the superintendent of the county of residence of the parents, or parent. This office has heretofore ruled that a nonresident coming into this State and giving birth to a child in any county in the State may surrender the child to the superintendent of the county in which the child was born. It would, therefore, be both inequitable and illogical to say that a resident of this State cannot do the same thing, especially where the statute is silent on the question.

I am of the opinion, therefore, that parents, or a parent, can, by means of a surrender affidavit, surrender a child to the county superintendent of public welfare of the county in which the child was born, regardless of the fact that the parents, have residence in another county. Of course, the county superintendent of public welfare does not have to accept such surrender unless, in his discretion, he desires to do so. I, furthermore, see no reason why it could not be incorporated in the surrender affidavit or instrument a condition that if a child could not be adopted in his county, it would be returned to the parents, or parent, in the county of their residence or the authorities of that county.

ADOPTIONS; DEATH OF ONE PETITIONER AND COMPLETION OF
ADOPTION BY SURVIVING PETITIONER.

9 September 1947

You state that you would like to know the procedure to be followed when one of the petitioners dies during the process of an adoption, and the surviving petitioner wishes to complete the adoption.

I think that this matter could be handled in two ways. The clerk could dismiss the whole proceeding and let the surviving petitioner bring a new proceeding for the adoption of the minor. Since this would involve extra cost, I see no reason why, under our Code of Civil Procedure, the clerk cannot allow the surviving petitioner in this same proceeding to go ahead and complete the adoption proceeding and adopt the minor. I see no reason legally why a new proceeding should be instituted, and the clerk still has the whole matter before him as to the surviving petitioner. It is true that the death of one of the petitioners may, in various ways, affect the sufficiency and adequacy of the home for adoption purposes. If a husband and wife seek to adopt a child, and the husband dies, this may affect the financial ability of the home in furnishing proper care for the adopted child. For this reason, where one of the petitioners dies and the surviving petitioner wishes to complete the proceeding, in my opinion, it would be necessary to have another social report and investigation as is provided by Section 48-3 of the General Statutes. In other words, the social reports should be made anew just as if one petitioner had originally filed the petition. When this is done and if the clerk still thinks that the adoption should be completed, then I see no reason why it cannot be completed in this manner and without bringing a new proceeding.

INTERSTATE TRANSFER OF CHILDREN; G. S. 110-57 RETROACTIVE.

9 September 1947

You ask us to refer to Section 110-57 of the General Statutes, as amended, relating to the interstate transfer of children. You would like to know if these revisions or amendments are retroactive since, if such revisions or amendments are retroactive, they would apply to cases now pending which are exempt under its provisions.

You are advised that in our opinion, the amendments to Section 110-57, or any revisions of that section, are retroactive and should be applied retroactively to cases now pending. This is a remedial statute; and it does

not, in any manner, intend to impair the obligations of contracts or disturb vested rights. A remedial statute enlarging rights instead of impairing them is retrospective even in the absence of directions to the contrary. See *B. C. REMEDY COMPANY v. UNEMPLOYMENT COMPENSATION COMMISSION*, 226 N. C. 521.

ADOPTION; CONSENT OF PRESUMPTIVE FATHER; NECESSITY OF CONSENT
AS WELL AS PARTIES.

1 October 1947

In your letter of August 13, 1947, you refer to two adoption proceedings from Guilford County which apparently deal with the illegitimate child of a married woman in each case, the husband not being the father of the child. You quote a portion of the interlocutory order entered, which order is as follows:

"The parents of said child were not married to each other and the mother has executed a written consent to the adoption of said child by the petitioners and that..... was the husband of the mother at the time said child was born and that said..... has been duly served by publication regarding the adoption of said child, that time allotted by law for answering has expired and that no answer has been received."

You ask this office whether or not we think the above information is sufficient to show that the legal father has been properly eliminated from being a necessary party to the consent required.

I am sending you a copy of a letter written by this office to Mr. R. E. Whitehurst on this same problem which answers the question raised in your letter. For the reasons given in the letter of June 10, 1947, the answer is that making the legal or presumptive father a party to the proceeding and his failing to answer in the proceeding is not consent. Consent cannot be gained by a mere default or failing to answer in an adoption proceeding. I think it would be better in these proceedings to have the clerk make a finding of non-access based upon evidence produced by witnesses other than the husband and wife and according to the letter sent by this office to Judge T. L. Johnson, a copy of which is in your office.

ADOPTION; CUSTODY OF CHILD UPON DISMISSAL OF
ADOPTION PROCEEDING.

6 October 1947

In your letter of August 13, 1947, you inquire of this office as follows:

"In the event that an adoption proceeding is dismissed or revoked, to whom does legal custody revert? We would like to know how this would apply both in cases where the child has been placed on the basis of a direct consent and a consent given by an agency based on a surrender affidavit."

These questions are not specifically answered by the adoption statute, but it seems to me that in cases where the parent or parents execute a proper surrender affidavit to the superintendent of public welfare of the county

and the adoption proceedings are dismissed in the adoption Court, that ordinarily the custody of the child would be returned to the superintendent of public welfare. In most cases, after the execution of proper instruments of surrender, the parent or parents regard the matter as closed; and thereafter, their whereabouts are unknown. I see no legal obstacle to the incorporation in the instrument of surrender as to what shall be done with the child in case the adoption is dismissed if the parent or parents and the superintendent of public welfare can arrive at a satisfactory agreement on that phase of the matter.

If the child has been placed with prospective adoptive parents by a direct placement and the adoption Court dismisses the proceeding, thereby refusing to allow these persons to adopt the child, it seems to me that the jurisdiction of the Juvenile Court should then be invoked to determine the ultimate future of the child. In either case, whether agency placement or direct placement, the jurisdiction of the Juvenile Court can be resorted to if necessary.

ADOPTION; WARD OF COURT; INTERLOCUTORY ORDER; CUSTODY OF CHILD
FROM FILING A PETITION UNTIL INTERLOCUTORY IS GRANTED.

6 October 1947

In your letter of August 13, 1947, you inquire of this office as follows:

"The question has arisen as to whether or not the child being adopted actually becomes a ward of the court of adoption. If it is interpreted that the child becomes a ward of the court at the time the interlocutory order is given, who has legal custody of the child from the time the petition is filed until the interlocutory order is given?"

It seems to me that we are compelled to say that under the provisions of Section 48-5 of the General Statutes that a child who is the subject of an adoption proceeding is distinctly a ward of the Court from the time an interlocutory order of adoption is entered until the final order is entered or an order of dismissal is entered. I think two sentences of this section bear out this interpretation, and they are as follows:

"Within two years of the interlocutory order, but not earlier than one year from the date of such order, the Court shall complete the proceeding by an order granting letters of adoption or, in its discretion, by an order dismissing the proceeding, and the effect of any adoption so completed shall be retroactive to the date of application. *During this interval the child shall remain the ward of the Court and shall be subject to such supervision as the Court may direct.*" (Italics added).

Of course, the question naturally arises as to who has the prior right of custody of the child prior to the entry of the interlocutory order or, to be more specific, from the filing date of the petition until the interlocutory order is entered. I think this would vary according to the circumstances of the placement of the child. If the superintendent of public welfare of the county concerned receives the child by virtue of a surrender in writing executed by a parent or parents, as the case may be, then I think that this superintendent of public welfare would have the prior right to the custody

of the child until the interlocutory order is entered. I think the language of Section 48-5 bears out this construction since no further consent of the parents or guardian is necessary after a proper surrender affidavit has been executed. It would seem, therefore, that this leaves the superintendent of public welfare in control of the child until the interlocutory order is entered.

If this child has been directly placed by a parent or parents, then I think this parent, or these parents, would have prior right to the custody of the child unless the child remains for a period of six months or more with the prospective adoptive parents. After that period of time has elapsed, it is provided by Section 48-5 of the General Statutes that if such child is surrendered by a writing directly to the prospective adoptive parents, then the surrender shall not be revocable by the surrendering parent or parents. If such a surrender is made and the prospective adoptive parents keep the child for six months or more, then it seems to me that they have a prior right of custody until the interlocutory order is entered. Of course, if a surrender is made directly to the prospective adoptive parents and this surrender is not in accordance with Section 48-5, the prior right of custody would still remain, at all times, with the parent or parents of the child unless jurisdiction is assumed by the Juvenile Court. Particular attention is called to the fact that under Section 48-5 of the General Statutes, in order for a direct placement to prospective adoptive parents to be irrevocable after the passage of six months or more, the surrender must be in writing.

ADOPTION; EFFECT OF INSTRUMENT TRANSFERRING GUARDIANSHIP OR
CUSTODY OF CHILD EXECUTED BY FATHER.

23 December 1947

I refer to your letter of October 11, 1947, which deals with a child by the name of Howard Eugene Bradford. This instrument, copy of which is attached to your letter, was executed by Clifton Bradford, the father of the child, and was also signed by Mrs. A. M. Whitlock with the designation of Mother-Custodian and by M. L. Whitlock with the designation of Supporter of said child and joint custodian. This instrument purports to have been executed on the 12th day of July, 1945, and recites that Clifton Bradford, the father of the child, lives in Washington, D. C. It further recites that Mary Bradford, the wife of Clifton Bradford, is the mother of the child although she does not execute the instrument. The instrument recites that Howard Eugene Bradford, for about five years prior to the execution of the same, had already been in the custody and supported by M. L. Whitlock and his mother, Mrs. A. M. Whitlock, of Dallas, in Gaston County, North Carolina. The instrument recites consideration of eleven dollars (\$11.00) and the past support of the child as well as future custody and undertakes to convey and deliver the child unto the two Whitlocks for the period of their natural lives or the life period of the one who shall live the longest. It further provides that after the death of the survivor of the two Whitlocks, the child shall revert to its parents. The instrument undertakes to confer the authority of a general appearance by both parents in any Court of competent jurisdiction that may take jurisdiction over the child and to consent to the judgment of said Court not in conflict with the terms of the instrument.

I do not see how this instrument can, in any manner, be construed as a legal consent on the part of the parents for purposes of adoption. The last expression of our Supreme Court on this subject is to the effect that the consent of parents to an adoption must be shown within the record and must relate to particular persons seeking to adopt the child. *IN RE HOLDER*, 218 N. C. 136. Besides, the instrument does not purport to be a consent to adoption nor is an adoption contemplated by the expressions in the instrument. The most that the instrument undertakes to do is to transfer the care and custody of the child to the Whitlocks for such period of time as the surviving Whitlock shall live. At the death of the survivor of the Whitlocks, the child is to revert to its parents. The attempted authorization of general appearance in any Court of competent jurisdiction, in my opinion, is worthless in an adoption proceeding because it only purports to consent to a judgment not in conflict with the terms of the agreement.

I do not think we can gain any help or comfort from Section 33-2 of the General Statutes which allowed a father to execute a deed transferring the custody and tuition of his child to another person until the child was twenty-one years of age. If the father was not alive, the mother could exercise this power under the statute. This instrument makes no attempt to comply with the central features and requisites of this statute. It is to be noted that Section 33-2 of the General Statutes was further amended by Chapter 413 of the Session Laws of 1945 so that this transfer of custody and tuition can now only be accomplished by will. In other words, the transfer of custody and tuition in this State has been repealed. It is also certain that Section 33-2 of the General Statutes never, at any time, contemplated adoption; but at the most, it was a voluntary form of creating guardianship.

I am, therefore, of the opinion that it would be best if the persons concerned did not attempt any adoption in this case and that they refrain from instituting any adoption proceedings. It would seem to me that the better course of action is to simply retain custody and control of the child under this instrument and let the matter go no further and be content with the instrument. If these people have any property which they wish to pass on to the child at their death, they can do so by will; and since the parents of the child contemplate that at some time in its life it may return and be with them, it is very doubtful to me if they should attempt to change the name of the child to their name although, as you know, our statute provides that the name of a minor child can now be changed by a proceeding before the Clerk.

I regret the delay in answering this letter, but I have explained to you heretofore how this came about.

ADOPTION; NATURAL GUARDIANS; GRANDPARENTS; NECESSITY OF CONSENT
ON THE PART OF GRANDPARENTS IN ADOPTION PROCEEDING.

30 December 1947

In your letter of August 13, 1947, you present your question to this office as follows:

"We frequently have the question raised as to whether or not the grandparents are the natural guardians of the child when the parents

are dead. If the grandparents are the natural guardians in this case, we would assume that they are necessary parties to give or withhold consent in the case of a proposed adoption. If the grandparents are not natural guardians and a next friend is appointed to give or withhold consent, what rights do the grandparents have and would the fact that they have not been made parties to the consent leave the proceeding vulnerable to attack?"

So far as I have been able to find, a natural guardian is mentioned in our statutes in only two instances. In Section 33-3 of the General Statutes, it is provided that upon the death of the father of an infant, the mother surviving such father immediately becomes the natural guardian of such child.

I find also that Chapter 33 of the General Statutes, dealing with guardian and ward, has been amended by Chapter 413 of the Session Laws of 1947 by adding a new section designated as Section 33-1.1. This section provides, in substance, where there is no natural guardian of a minor or where a minor has been abandoned and in such events, the minor requires service from the Department of Public Welfare, the Superintendent of Public Welfare of the county in which the minor resides shall be the guardian of the person of such minor until the appointment of a guardian of the person of the minor under the provisions authorizing such appointment in Chapter 33.

I have been unable to find any cases in our jurisdiction which define the rights and duties of a natural guardian; and, therefore, I assume that such rights and duties would be those as existed at common law. In the case of *IN RE TENHOOPEN*, 202 N. C. 223, 226, our Supreme Court said:

"We hold that the father is the natural guardian of his children, and as a general rule and at common law has the paramount right to the custody and control of his children against all the world. It is the moral and legal duty of the father to provide for the protection, maintenance and education of his children. *NEWSOME v. BUNCH*, 144 N. C., 15; *IN RE TURNER*, 151 N. C., 474; *IN RE MEANS*, 176 N. C. at p. 307."

In 39 C. J. S. (Guardian and Ward) Section 3, page 10, in regard to a natural guardian or guardians by nature, we find the following:

"Guardianship by nature at common law, according to the early English authorities, was the right of the father, mother, and next of kin, in the order named, to the custody of the person of the heir apparent. This form of guardianship, at common law, did not extend to the younger children who were not heirs apparent. Guardianship by nature exists in the United States, but, since primogeniture does not obtain guardianship by nature extends to all the minor children of the father and mother in question. In this country the term is applied to a guardianship having all the incidents of the common-law guardianship by nature except as modified by statute. Other terms sometimes used as synonymous with guardianship by nature are 'natural guardianship,' 'guardianship by nature and for nurture,' and 'guardianship for nurture.' A guardian by nature is commonly designated as a 'natural guardian.'

"Unless it is otherwise provided by statute, the father or, in case of his decease, the mother of an infant is its guardian by nature; and where the father abandons his minor child, the mother becomes the natural guardian. In case of the death of both parents, it has been held that the grandfather or the grandmother, when next of kin, be-

comes the guardian by nature, although some authorities assert that under such circumstances there is no natural guardianship. Under statute, the guardianship by nature is sometimes vested in both parents, their rights being equal, or, in case of the death of one of them, in the survivor, or the right to guardianship is made to depend on the age of the child, the mother being entitled to the preference when the child is of tender years. In the case of an illegitimate child, the mother is the natural guardian, particularly where the statute so provides. In case of divorce, the parent to whom custody of the child is awarded becomes its natural guardian. Rights or duties which may belong to the mother as guardian by nature do not devolve on her husband, the minor's stepfather.

"A guardian by nature, as stated *infra* §74, ordinarily has no right to the possession or control of the ward's estate."

In 25 *American Jurisprudence* (Guardian and Ward) Section 7, page 12, the author states:

"On the death of the father, it is generally held that the widowed mother succeeds to his place as the head of the family and the guardian by nature of the minor children, with substantially the same rights which the father had during his lifetime, except so far as the local law may give the father the power to appoint a guardian by his will, and he exercises such power. If a man abandons his wife and children or has been removed from the guardianship by a proper court, the mother is entitled to the custody of the child, but her right is subject to the same right of control or removal by the courts, and to the same doctrine—namely, that the infant's welfare is the chief consideration in determining a contest as to its custody—that exist in relation to the guardianship of the father. It has been held, in some cases, that a clause in a decree of divorce awarding the custody of minor children to the mother *ipso facto* constitutes her their natural guardian, but there is authority to the effect that such a decree does not necessarily forever bar the father's right, and that after the death of the mother, the child will be restored to him if he shows his fitness. In a number of states, statutes have been enacted which make the father and mother joint guardians of minor children.

"There is some conflict among the authorities as to whether any one but the father or mother can properly be said to be a natural guardian. Some cases expressly hold that the parents are the only natural guardians, and that no other relation has the right to claim the guardianship of a child except by appointment, while other authorities extend the term to the next of kin, as, for instance, the grandparents of an orphan child." (Italics ours).

From what I have quoted above, you will see that according to our best legal authorities, there is a decided difference of opinion in this country as to whether or not natural guardianship extends to grandparents, uncles, aunts and others who are closest of the next of kin of the minor. The cases cited by the authors to support the text do not agree in their holdings, some courts holding that natural guardianship extends no further than the father and mother and the other courts holding that such form of guardianship extends to the next of kin. It is impossible to say on which side lies the weight of authority. So far as I can find, our own Supreme Court has not been called upon to decide the question.

From the viewpoint of our statutes on the subject, it would seem to me that there has definitely been shown a legislative intention to limit natural guardianship to the father and mother. The very fact that in Section

33-3, it is expressly provided that upon the death of the father, the mother becomes the natural guardian and the statute thereafter is absolutely silent and makes no mention of any natural guardian in the case where the father and mother are both dead, to my mind, indicates, by its silence, the intention to extend the relationship no further. Section 33-1.1 does not enlarge upon this situation but simply provides for certain duties of the Superintendent of Public Welfare of the county if there is no natural guardian.

I am of the opinion, therefore, that so far as this State is concerned, natural guardianship extends no further than the father and mother of a minor child and that when the parents of a minor child are both dead, grandparents, uncles, aunts, etc., in order of next of kin, are not natural guardians, and they do not have to be made parties in adoption proceedings; and the fact that they are not parties to an adoption proceeding, in my opinion, does not invalidate the proceeding or render it vulnerable to attack. In such cases, if there is no guardian of the person appointed by the Court, or general guardian, it seems to me that you should proceed under the Act of 1945 and have the next friend appointed to give or withhold consent. It should be borne in mind that Section 48-5 of the General Statutes, which lists the persons who shall give consent in adoption proceedings, also lists "the person with whom such child resides, or who may have charge of such child." In cases where the person with whom such child resides or the person having charge of such child is not the same person adopting the child, I think you should consider procuring the consent of these persons in addition to the appointment of a next friend.

LEGAL SETTLEMENT; DERIVATY OF SETTLEMENT; MARRIED WOMAN ACQUIRING SETTLEMENT OF HER OWN; SETTLEMENT OF LEGITIMATE CHILDREN; LEGITIMATE CHILDREN HAVING SETTLEMENT OF MOTHER

10 January 1948

Reference is made to two questions submitted on the law of legal settlement presented by the Department of Public Welfare of Mecklenburg County in connection with their In-Service Training Program. These questions are stated as follows:

"We are interested in obtaining an interpretation of Chapter 153-159, Par. 2 in Michie's N. C. Code.

"The section in question reads:

"Married women to have settlement of their husbands.—A married woman shall always follow and have the settlement of her husband, if he have any in the state; otherwise, her own at the time of her marriage, if she then had any, shall not be lost or suspended by the marriage, but shall be that of her husband, till another is acquired by him, which shall then be the settlement of both."

"We are interested in knowing under just what conditions a married woman has a settlement of her own.

"We are also interested in Par. 3 of the same Act, which reads:

"Legitimate Children to Have Settlement of Father.—Legitimate children shall follow and have the settlement of their father, if he has any in the state, until they gain a settlement of their own; but if he has none, they shall, in like manner, follow and have the settlement of their mother, if she has any."

"In connection with this section of the Act, we are interested in knowing under what circumstances legitimate children have the settlement of their mother."

Our statutes concerning legal settlement are found in Section 153-159 of the General Statutes, and most questions usually arise where it is sought to impose liability against the proper county in this State for support of the poor. There is not much legal authority in this State on the subject, and the cases in other jurisdictions are of a contradictory nature in addition to having been decided under statutes which vary in their language. Legal settlements are regulated by statutes and are not governed by the law of domicile or of citizenship. It has been found over a period of time that Section 153-159 is not expansive or ample enough to determine all of the questions that arise on settlement; and, in fact, I have never been able to find two people that agreed upon the correct interpretation of subsection (2) of Section 153-159, relating to married women. The settlement of a married woman is what is known as a derivative settlement. Likewise, the settlement of children is known as a derivative settlement. This is explained by one text writer as follows:

"It is the common-law rule that a person incapable of acquiring a settlement in his or her own right may gain a derivative settlement by reason of his or her relationship to another person having a legal settlement; and this rule has been recognized as in force in the different states of the United States. The doctrine is applicable to husband and wife, children, and slaves."

Since the first question deals with the conditions under which a married woman has a settlement of her own, it might be first pointed out that our statute allows a married woman to retain her settlement apparently only where the husband has no settlement of his own in this State. A person must reside continuously in any county for one year in order to be deemed legally settled in that county. It would seem to me, therefore, that if a man comes to this State from a foreign state and marries a woman here who is already settled in a county in this State, she would retain her own settlement until her husband acquired a settlement in some county in the State; and since every legal settlement continues, under our statute, until a new one is acquired, whether within or without the State, it is conceivable that if the parties left the State immediately after marriage and had not been in the foreign state long enough to acquire a settlement and the husband and wife separated, she could return to North Carolina and still retain her settlement in the county in which she originally acquired such settlement.

Likewise, if a man comes from a foreign state and marries a woman who has a settlement in a county in this State and immediately after marriage they must move to still another county in this State, it would seem that this married woman would retain her settlement in the original county until the husband had lived long enough in the county to which they removed to acquire a settlement. If we suppose a husband and wife both settled in a county and the husband deserts the wife and goes to another county, then it seems to be the opinion of this office, from a review of its former interpretations, that the married woman would retain her settle-

ment in the county where the husband and wife originally lived; and in such case, the wife would not necessarily follow that of the husband. There are perhaps many conceivable situations, but I think they would all revolve around the proposition of desertion of wife by husband or the wife's retaining her settlement until a husband who formerly had no settlement in this State acquires one. What I have said about the wife's retaining her settlement in case she is deserted by her husband likewise applies if he should go to a foreign state instead of another county in this State.

As to the settlement of legitimate children following that of the mother, I quote from 48 C. J. (Paupers), beginning with Section 120, page 485, since I think this explains the second question much better than I can attempt to do so in my own language. The quotation is as follows:

"Where legitimate minor children have a settlement derived from their father, his settlement must ordinarily be theirs in his lifetime, and they cannot acquire that of their mother. But if the father has no settlement, and the mother has one, the children of the marriage take the settlement of the mother, although the mother's settlement was derived from her parents, and although the children were born in a different town from that in which the mother had her settlement.

"Where the parents of minor children are divorced, and the mother is given the exclusive custody and control of the children, they take the legal settlement of the mother, and if she thereafter removes to and acquires a new settlement in another county, taking the children with her, they take the new settlement so acquired. On the other hand it has been held that the divorce of the parents and the appointment of the mother as guardian of their minor child does not affect the settlement of the child derived from its father.

"It is a rule of general application that the settlement of a widow, acquired in her own right after the death of her husband, is, by the common law, communicated to her minor children, even though such children had a derivative settlement from their father. But under a statute providing that a child shall have and follow the settlement of his father, if he has one, until he, the child, gains another in his own right, and shall follow and have the settlement of the mother in case the father is unsettled, a derivative settlement of a child acquired from his father is not affected by the acquisition of a settlement by the mother in her own right after the father's death. So if the child is emancipated, he does not take any subsequent settlement acquired by his widowed mother in her own right. But the mere fact that a minor child has left the family of his mother after the father's death, and is not subject to the actual control of his parent, does not constitute an emancipation, so as to prevent him from deriving the mother's settlement.

"Where a child has acquired a derivative settlement from his father, such settlement does not, upon a second marriage of the mother, follow the settlement of the mother so gained; and the same rule has been followed where the child had acquired no settlement from his father. So a minor child having the settlement of his mother does not, at common law, lose it and acquire a new settlement gained by the mother by a second marriage, and the fact that the child removed with his mother to the place of new settlement does not alter the rule. Nor, at common law, is the settlement of a woman acquired by marriage communicated to her child by a former marriage, even where such child has no domicile in the state. In a number of cases, however, under statutes providing that children shall have the settlement of their mother if their father was unsettled, it has been held that if their father is unsettled, the children follow the settlement acquired by their mother by a second marriage when the father had no settlement in the state.

"Where an abandoned wife procures a divorce from her husband, with custody of her child, and afterward remarries, she can gain no new settlement for the child unless time enough has elapsed between the divorce and the second marriage to enable the wife to acquire a settlement in her own right."

It will be seen that what I have said corresponds almost with the answers given you on the memorandum, dated August 29, 1947, which is attached to the letter of the Public Welfare Department of Mecklenburg County, dated August 9, 1947.

I would like to call attention to the fact that subsection (6) of Section 1342 of Michie's North Carolina Code of 1939, which is quoted in the memorandum, dated August 29, 1947, which is attached also to the letter from the Department of Public Welfare of Mecklenburg County, has been repealed by Chapter 753 of the Session Laws of 1943; and it is, therefore, no longer required for a person to reside continuously for three years after coming into this State in order to acquire a settlement. Under the present law, therefore, we are governed by the continuous residence for one year.

ADOPTION; CONSENT; AUTHORITY OF COUNTY SUPERINTENDENT OF WELFARE
TO SIGN CONSENT UNDER ORDER OF JUVENILE COURT

13 January 1948

In this case, it appears that the mother of two children was unable to care for them. She applied to the Board of Public Welfare of Guilford County for the children to be boarded or placed for adoption. The mother then deserted the children and has not been seen or found since although diligent effort has been made to get in touch with her. On the 15th of July, after publication of summons, the custody of the children was given to Mrs. Stern, Superintendent of Public Welfare of Guilford County. A case worker placed these children in two prospective adoptive homes. The family adopting Mary (born July 11, 1946) has petitioned the Court for her adoption. The question is, therefore, asked if the Superintendent of Public Welfare, on the basis of the order of commitment of custody, can give sufficient consent to have the children adopted. It further appears that the mother of the children was married in 1932. She did not obtain a divorce until October 1, 1945, which is nine months before the birth of the youngest child. The grounds of the divorce are not known since it was obtained in another county. It appears that the mother had a trial held to prove that a man other than her husband was the father of both children. The blood test revealed that the man in question could not have been Larry's father but could be the father of Mary. The Judge decided, however, that the accused man was not guilty. The question is asked if the legal father should be made a party in consenting to both adoptions.

First of all, I think it should be said that it seems to me, under the facts in this case, considered solely as a matter of law, that the children should be considered as legitimate for it appears they have both been born in wedlock or while the status of marriage existed. The closest question would involve Larry, where it appears that the mother obtained a divorce on October 1, 1945, which is nine months before the birth of the youngest

child. This child, however, would be considered as legitimate under Section 50-11 of the General Statutes which provides that no judgment of divorce shall render illegitimate any children in *esse* or begotten of the body of the wife during coverture. It seems to me, therefore, that both children will have to be dealt with on the basis of legitimate children; and, therefore, this means that the presumptive, or so-called legal father, will have to be taken into consideration.

As I have said in former letters, it is true that one of the persons who can give consent to an adoption under Section 48-5 of the General Statutes is a person "with whom such child resides, or who may have charge of such child." It is not thought by us, however, that this is intended to take the place of the consent of living parents who stand first in the order of those persons who may consent to adoptions. I think, therefore, that there should be a finding by the Juvenile Court that the children have been *wilfully* abandoned and that the father should be served with process in the Juvenile Court either by actual service or publication. It appears from the order of the Juvenile Court that the mother has already been served by publication in the Juvenile Court. The best thing I can see to do is to rely upon wilful abandonment where the presumptive or legal father has been served by publication in the Juvenile Court or by actual service as the case may be, taking into consideration the fact that the mother has already been served with process. In addition to relying upon the abandonment of the children as provided by Section 48-10 of the General Statutes, it would greatly strengthen this adoption, if the Clerk of the Court would appoint the Superintendent of Public Welfare to act as next friend of the children under Section 48-5, as amended by Chapter 787 of the Session Laws of 1945. The Superintendent of Public Welfare, therefore, in the capacity of an appointed next friend could give consent to the adoption since the Clerk can well find, it seems to me in this case, that the mother has disappeared and cannot be found. If this is also true of the father, then he could be included in such order of appointment and finding. If the father refuses to give consent, there is, of course, nothing else to do except to rely on the judgment of abandonment of the Juvenile Court, as to him, assuming that he is made a party to the proceeding in the Juvenile Court.

APPLICATION OF CHAPTER 572 OF 1947 SESSION LAWS TO THE NORTH CAROLINA COUNCIL OF CHURCHES

23 January 1948

I have your letter of January 2 with reference to the necessity of the North Carolina Council of Churches complying with the provisions of Chapter 572 of the Session Laws of 1947, which has been under discussion between your office and this office for some time.

A liberal construction of G. S. 108-84, which I think in the case of the North Carolina Council of Churches should be followed, would exempt this organization from licensing under this statute. On account of the fact that a serious question might arise as to the constitutionality of the statute requiring the registration of the Council of Churches, I think a liberal construction of the statute would avoid a constitutional question, should we adopt it.

STATE BOARD OF PUBLIC WELFARE; LAWS REGULATING THE SOLICITATION OF FUNDS AND ALMS; CHAPTER 572 OF THE SESSION LAWS OF 1947; COVERAGE OF STATE COMMITTEE FOR TRAFFIC SAFETY, INC.

27 January 1948

Reference is made to your letter in regard to the question as to whether or not the State Committee for Traffic Safety, Inc., is such an organization as is covered by the provisions of Chapter 572 of the Session Laws of 1947, dealing with the regulation of organizations and individuals soliciting funds from the public for the purposes mentioned in this Act.

In reviewing this matter, you will recall that some time during the year of 1946 this same question arose; and our office then reviewed the former law on this subject, which consisted of Article 5 of Chapter 108 of the General Statutes of 1943. At that time, we were of the opinion that the scope of coverage and the nature of the exemptions as contained in the former law did not bring within its purview the activities of State Committee for Traffic Safety, Inc.; and we so advised your office at that time that, in our opinion, this Corporation was not covered by Article 5 of Chapter 108 of the General Statutes of 1943.

Since that time, the General Assembly of 1947 saw fit to rewrite Sections 108-80 through 108-86 of the law regulating the solicitation of public funds; and this was done by means of Chapter 572 of the Session Laws of 1947. You again raise the question as to whether or not the organization known as State Committee for Traffic Safety, Inc., would now be covered and subject to regulation under the revised and rewritten statutes.

I have before me a copy of the certificate of incorporation of State Committee for Traffic Safety, Inc. The salient features of the charter are as follows:

(1) The principal office is located in the City of Raleigh in Wake County, but it has the right to change the location of the principal office; and it is authorized to have one or more branch offices and places of business at other places in the State of North Carolina.

(2) The organization, from its charter, is non-profit, non-political, non-sectional and non-sectarian; the charter forbids the organization from taking any part in politics.

(3) The organization is designed to sponsor programs to reduce traffic accidents on the streets and highways of the State; it is to cooperate with National, State, county and municipal governments and civic organizations. It is designed to sponsor educational programs through the State public schools and educational institutions of the State by teaching traffic safety programs. It is authorized in these educational programs to use maps, films and all modern methods and techniques for the purpose of inculcating and teaching traffic safety; and among other things, it intends to conduct training schools throughout the State for traffic court judges, solicitors and enforcement officers; there are other educational objectives stated in the charter.

(4) The organization is authorized to maintain a membership of classes; to collect membership dues; receive donations, bequests and devises; to purchase, hold, acquire and dispose of all kinds of property, real, personal and mixed; to employ such agents, officials and employees as are necessary to carry on its work.

(5) The corporation is a non-profit and non-stock corporation, and its membership can include persons, firms and corporations if they meet the terms and conditions for membership described in the by-laws.

(6) The management of the corporation and its properties is vested in a Board of Governors of such number and representation as described by the by-laws. It is to have such officers as are determined and elected by the Board of Governors. The following public officials are named as ex-officio members of the Board: The Governor of North Carolina is Ex-Officio Chairman of the Board of Governors; the Commissioner of the Department of Motor Vehicles, the Chairman of the State Highway and Public Works Commission and the Superintendent of Public Instruction are named in the charter as members by virtue of their offices.

(7) Authority is given to the Board of Governors to enact and determine by-laws, make amendments and to establish rules and regulations. No member of the Board of Governors can receive any compensation for services as officer or governor nor can anyone receive any dividend or have any right to any assets of the corporation upon its dissolution. Upon dissolution or upon the corporation's ceasing to function for the purposes for which it is created, all of its property shall escheat to the State of North Carolina to be used by the public schools of the State to continue the teaching of traffic safety.

The principal coverage section of Chapter 572 of the Session Laws of 1947, which is a rewriting of Section 108-180 of the General Statutes, is as follows:

"Except as hereinafter provided in G. S. 108-84, no person, organization, corporation, institution, association, agency or co-partnership except in accordance with provisions of this Article shall solicit the public whether by mail, or through agents or representatives or other means for donations, gifts or subscriptions of money and/or of gifts of goods, wares, merchandise or other things of value or to sell or offer for sale or distribute to the public anything or object whatever to raise money or to sell memberships, periodicals, books of advertising space or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment or exhibition or by any similar means for any charitable, benevolent, health, educational, religious, patriotic or other similar public cause or for the purpose of relieving suffering of animals unless the solicitation is authorized by and the money or other goods or property is to be given to an organization, corporation, institution, association, agency or co-partnership holding a valid license for such purpose from the State Board of Public Welfare, issued as herein provided."

Persons, firms and corporations desiring to solicit funds as described by this coverage section must apply to the State Board of Public Welfare for a license. They must furnish certain information to this Board in their applications on a form furnished by the Board. The State Board of Public Welfare is authorized to make an investigation of the matter; and if it finds that the proposed solicitations are for the purposes set forth in the application, then it can issue a license for such solicitations or the receipt of donations. The State Board of Public Welfare is prohibited from issuing a license to any individual or organization which pays or agrees to pay to any other individual or organization an unreasonable or exorbitant

amount of the funds collected as compensation. If the Board refuses to issue a license, a procedure for a hearing is provided, with decision of the Board. Solicitations and collections without the written authority of the Board are prohibited. It is a misdemeanor, punishable by a fine of not more than \$1,000.00, in case of an organization; and in case of an individual, punishable as other misdemeanors if the law is violated by doing any of the prohibited acts.

Section 108-84, as rewritten and as set forth in Chapter 572 of the Session Laws of 1947, is the paragraph dealing with exemptions or in other words, a statement of the provisions and circumstances under which the article will not apply. This section is as follows:

"The provisions of this Article shall not apply to any solicitation or appeal made by any church, or religious organization, school or college, fraternal or patriotic organization, or civic club located in this State when such appeal or solicitation is confined to its membership nor shall the provisions of this Article apply to any locally indigenous organization, institution, association or agency having its own office, managing board, committee or trustees or chief executive offices located in or residing in a city or county from publicly soliciting donations or contributions within a city and the county or counties in which said city is located or within the county in which such an organization, institution, association or agency is located and operates; provided that nothing in this Article shall apply to any solicitation or appeal by any church for the construction, upkeep, or maintenance of the church and its established organization or for the support of its clergy."

The above Act became effective from and after July 1st, 1947. While the State Committee for Traffic Safety, Inc. utilizes the services of State officials as ex-officio members of its Board of Governors and while the objectives expressed in the charter are indeed worthy and undoubtedly deserve the support of the citizens of this State, nevertheless, I cannot find anything in the nature of the organization or its charter that renders it a State agency or *quasi* State agency. It is not invested with any sovereignty of the State nor does it exercise any State sovereignty. I do not think that State agencies or instrumentalities of government in our State can be created by a charter issued by the Secretary of State under the general corporation laws. It would take special legislative acts to bring about such a purpose.

Chapter 572 of the Session Laws of 1947, and especially Section 108-80 of this Act, is very broad in its scope of coverage and virtually takes in all types of organizations or persons soliciting funds. I find nothing in Section 108-84 which gives the exemptions that would withdraw this organization from the scope of coverage of the Act. Of course, this Act would not be retroactive and would not apply to solicitations made by State Committee for Traffic Safety, Inc. prior to July 1st, 1947. I am of the opinion, however, that State Committee for Traffic Safety, Inc. is subject to the provisions of this Act and that if it makes any solicitations or has made any solicitations subsequent to July 1st, 1947, by any method or means or through the mail or whatsoever the procedures followed, then it is subject to the provisions of the Act and should apply and obtain license as other organizations.

ADOPTION; REFUSAL OF FATHER TO CONSENT; ADJUDICATION OF
ABANDONMENT IN FOREIGN COURT; FAILURE TO ANSWER
PETITION FOR ADOPTION

13 February 1948

I have before me copy of letter of Honorable J. N. Sills, Clerk of the Superior Court of Nash County, and also copy of decree entered in the Circuit Court of the City of Portsmouth, Virginia, on the 13th day of September, 1944, in the case of Hazel Brannon Wallace v. Roy Wallace. It appears that a petition was filed in the office of the Clerk of the Superior Court of Nash County in which the petitioner sought to adopt Gorham Wallace. Service of process by publicaion was served on the father, and an interlocutory order was entered. After the entry of the interlocutory order, it was discovered that the father was living in the County five or six miles from Nashville. Thereupon, service was served upon the father personally; and the father came to the office of the Clerk of the Superior Court and stated that he was very much opposed to the adoption of his child and that he would not sign the consent to such adoption. The father did not file any written answer to the petition.

I think the main question raised by this letter and decree is whether or not this child can be adopted over the protest of and without the consent of the father.

It is provided in Section 48-5 of the General Statutes that certain persons, in the order named, may give consent to an adoption. I think the persons named in this statute are set forth in the order of their priority; and if the parents are living, they must consent to an adoption proceeding, and the fact that they are alive excludes consent of other persons therein named. I do not think that the failure of the father to answer the petition in the adoption proceeding affects the question of consent. It has long been the position of this office that consent cannot be acquired by a mere default in answering an adoption proceeding since consent is an actual, positive mental process or action, an exercise of the will and an expression of choice. In an adoption proceeding, consent is jurisdictional. You have, in your office, already some two or three opinions giving our views on this phase of the matter.

The only other thing that needs to be considered, it seems to me, is the question of the abandonment of the child. It is, of course, provided in Section 48-10 of the Adoption Law (General Statutes) that where a Juvenile Court has declared the parent or parents unfit to have the care and custody of such child or has declared the child to be an abandoned child, such parent or parents shall not be necessary parties in an adoption proceeding nor shall their consent be required. I have grave doubts if this section refers to the adjudications of a foreign court in a sister state. I think it refers to Juvenile Courts in our own State, but it is not necessary to give an answer to this part of the question because the decree shows that it was entered in a chancery proceeding in a Circuit Court of Virginia. It is not a Juvenile Court. The decree does not say anything about the father's deserting the child. The decree states that the defendant, Roy Wallace, wilfully deserted the complainant, Hazel Brannon Wallace. It grants a divorce and awards the custody of Gorham Wallace, the child, to the mother.

While our statute uses the word "abandonment," the decree uses the word "desertion"; and whatever difference there may be in the meaning of these words, the decree certainly does not find that the father has wilfully deserted the child.

Frankly, I do not see how a valid adoption can be had in this proceeding if the father still continues to withhold his consent. It is possible that the Clerk could sign a final order, the father having been made a party to the proceeding; and if this order stood without any action on the part of the father to vacate it for a period of one year after actual notice of the adoption on the part of the father, then it may be that the adoption would possibly be valid under the curative statutes provided in the last three sentences of Section 48-5. If the father, however, tried to vacate the order, I think he could do so. The fact that a decree of divorce was entered between the father and the mother would not do away with the order that the father must consent to the adoption since divorce, under our adoption statute, does not forfeit the father's rights in the child at least so far as consent to adoption is concerned.

Of course, as you know, our opinions on such matters are only advisory. The Clerk of the Superior Court of Nash County is not bound by our opinions; and if the attorney can convince the Clerk that there are good and valid reasons why the final order should be signed, then, of course, the Clerk has every right to disregard our opinion.

STATE BOARD OF PUBLIC WELFARE; REGULATION OF PERSONS, FIRMS, OR
CORPORATIONS SOLICITING PUBLIC AID FOR CHARITABLE PURPOSES;
SALES OF THE UNITED SUBSCRIPTION SERVICE

17 March 1948

Reference is made to your letter of March 10, 1948, dealing with the plan of operation of the United Subscription Service of Rockford, Illinois.

It appears that the District Manager of the United Subscription Service describes his method of operation as follows:

"He secures the sponsorship of a patriotic organization for sales of his magazine, giving the sponsoring organization a certain per cent of the sales price—usually \$.20 on a magazine. This bonus or percentage is credited to the account of the patriotic or sponsoring organization for the purchase of a hot pack for the use of the community in cases of infantile paralysis, etc. The appeal to the prospective subscriber for the purchase of the magazine is based on the value of the subscription to the community through the purchase of the hot pack; therefore, it would appear that the sales appeal is a charitable appeal."

You inquire if this method of operation is covered by Chapter 572 of the Session Laws of 1947.

Chapter 572 of the Session Laws of 1947 contains a rewriting of Chapter 108, Sections 80 through 90 of the General Statutes of North Carolina. The coverage provisions of this statute are contained in Section 108-80, which is a part of Section 1 of Chapter 572 of the Session Laws of 1947.

I quote the coverage provision of this Act as follows:

"Except as hereinafter provided in G. S. 108-84, no person, organization, corporation, institution, association, agency or co-partnership except in accordance with provisions of this Article shall solicit the public whether by mail, or through agents or representatives or other means for donations, gifts or subscriptions of money and/or of gifts of goods, wares, merchandise or other things of value or to sell or offer for sale or distribute to the public anything or object whatever to raise money or to sell memberships, periodicals, books, or advertising space or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment or exhibition or by any similar means for any charitable, benevolent, health, educational, religious, patriotic or other similar public cause or for the purpose of relieving suffering of animals unless the solicitation is authorized by and the money or other goods or property is to be given to an organization, corporation, institution, association, agency or co-partnership holding a valid license for such purpose from the State Board of Public Welfare, issued as herein provided."

The exception clauses of the Act are found in Section 108-84, and this section provides in substance that certain organizations, including patriotic organizations, located in this State are exempt when such appeal or solicitation is confined to membership. Indigenous organizations whose managing board, committee, or trustees, or chief executive offices are located in a city or county, may solicit donations or contributions within a city or county in which the city is located, or within the county where such organization, institution, or association is located and operated. Solicitations and appeals made by churches for the construction, upkeep or maintenance of the church, and its established organization, or for the support of the clergy are also exempt.

I think that Section 108-80 covers the situation described in your letter. While the United Subscription Service does not turn over funds to the patriotic organization that may be concerned, under the statement of the District Manager it does credit the patriotic organization a percentage of the sales price of the periodical or other object sold by the subscription service. It is, therefore, to that extent promoting by the method of selling periodicals, and is thereby securing property for the benefit of a patriotic organization. The fact that the subscription service does not turn over all of the proceeds of the sale to the patriotic organization, in my opinion, does not make any difference. It turns over part of the proceeds of the sale to the patriotic organization in the form of a hot pack for use in cases of infantile paralysis, or other property. To that extent and in that proportion it is, therefore, within the coverage of the statute.

COUNTIES; TAX LEVY FOR RELIEF OF THE POOR; FIVE-CENT LEVY
AUTHORIZED BY CHAPTER 562, SESSION LAWS OF 1945

1 April 1948

I received your letter of March 31 and note that the question has arisen in Edgecombe County as to the effect of the amendment provided by Chapter 562 of the Session Laws of 1945, providing that the several counties

of the State may levy taxes not to exceed five cents on the one hundred dollars valuation for the special and necessary purpose set out in the first paragraph of G. S. 153-152. You state that the question raised is as to whether or not this Act would be applicable to Edgecombe County, which is excepted from the counties included in the provisions of the second paragraph of G. S. 153-152.

In my opinion, the exception of the counties, including Edgecombe, provided in the second paragraph of G. S. 153-152 applies only to the right to contract for hospital services, as provided in the second paragraph of that section. The excepting provision is as follows: "This paragraph shall not apply to the Counties of Ashe," etc.

The amendment to the section was to add at the end of the first paragraph the language referred to. It is my opinion that all the counties of the State are included in the amendment of 1945, and that Edgecombe County may lawfully levy the tax referred to.

ADOPTION; JUVENILE COURTS; JURISDICTION

30 April 1948

In your letter, you state in some detail the situation with reference to the child, Robert Wynn. The child was born in Durham. He was taken to the State of Florida when he was approximately six weeks old and placed in an institution. The Florida institution has been closed, and children with out-of-state residence were returned to the State of birth. It appears that the mother of the child was married a short time before his birth but that this marriage was declared null and void in a Florida Court in July, 1936. I, of course, do not know the effect of this decree of nullification as to the legitimacy of this child. The mother's last known address at the time of her admission to the maternity home was Wayne County. You propose to have the child declared to be an abandoned child in Wayne County provided the Juvenile Court of Wayne County has jurisdiction over the child. I assume from your letter that the child is not actually in Wayne County as you state that the child is being cared for from State funds and is placed in a licensed boarding home in another county in the State.

It seems to me that under Section 110-21 of the General Statutes, you should resort to the Juvenile Court of the county in which the child now actually resides; that is, the county where the child happens to be at this time. This Section states in substance that the Superior Courts shall have exclusive, original jurisdiction of any case of a child less than sixteen years of age residing *or being at the time within their respective districts*, if the child is dependent upon public support or is destitute, homeless or abandoned. It seems to me that this is sufficient to give the Juvenile Court of the County where the child is living in the boarding home jurisdiction over the child under these circumstances. No doubt, the legal settlement of the mother is now in some other State; and because she last lived in Wayne County, I do not think we are justified in acting on the assumption that the child would have any legal settlement in Wayne County. The mother has not been seen or heard of in Wayne County since she left with the child for Florida in 1936.

PUBLIC WELFARE; SOLICITATION OF ALMS; SECTIONS 108-80, 84 AND 86
OF THE GENERAL STATUTES

2 June 1948

Reference is made to your letter of May 20, 1948, as to the status of the Red Cross with reference to the solicitation of funds and alms in the State of North Carolina, and especially with reference to the provisions of our statutes cited above in the subject of this letter.

As you know, this matter has been under consideration for some time, both in your office and in our office; and there have been some conferences in regard to the same.

Without discussing all of the legal details and ramifications, we are of the opinion that there is considerable doubt as to whether the Red Cross falls within the provisions of the above cited statutes. In view of the doubt that exists, we think the same should be resolved in favor of noncoverage; that is, in favor of the Red Cross, and we so advise your agency.

ADOPTION; CONSENT OF MOTHER WHO HAS BEEN ADJUDGED INSANE

16 June 1948

You inquire as to the procedure to be followed in securing the consent for adoption of a child whose mother has been adjudged insane and committed to the State Hospital. The mother has been released, but there has been no court procedure as to restoration to sanity. The husband and wife have a deed of separation and the husband, or father, has been given the custody of the child. The father has given his consent to the adoption.

I doubt if there is any procedure that can be followed that will give an absolute and valid substitute for the actual consent of the mother in this case. Our law simply does not deal with the question of consent where a person has been adjudged to be insane. Since the mother has been legally declared to be insane, I don't see how she can give a valid consent to adoption if she were present and expressed a desire to do so. Where a person has been declared to be insane the presumption of insanity continues to exist until there has been a restoration or legal adjudication to the contrary. I likewise do not see how any court can declare that an insane person abandons his or her child, if there is not sufficient mentality in the contemplation of law to perform the willful intent to abandon.

The only thing that I can suggest is that you go ahead under Section 48-10 and if the mother cannot be found, have a next of friend appointed to give consent as we have been doing in all of these doubtful cases. Nobody knows whether this procedure is valid or not, but it is the best thing we know to do under the circumstances.

ADOPTION; RESIDENCE; MILITARY RESERVATION; EXCLUSIVE JURISDICTION

16 June 1948

Briefly, your letter raises the question as to the residence of persons residing in Midway Park in Onslow County for the purpose of prosecuting petitions for adoption. From the letters of Mr. J. T. Gresham, Jr., Attor-

ney, and Mrs. Laura M. Starling, Superintendent of Public Welfare of Onslow County, it appears that many persons living in Midway Park would possibly like to adopt a child if they could establish the necessary residence under the adoption laws of this State. These persons, or many of them, lived at Midway Park for more than a year before the Navy Department acquired exclusive jurisdiction over this area. On June 28, 1946, the Navy Department accepted exclusive jurisdiction over this area and this information has been confirmed by this office in connection with the voting rights of persons in Midway Park.

We are of the opinion, however, that persons who lived in Midway Park for over twelve months before the Navy Department acquired exclusive jurisdiction over the area can well be said to be residents of the State of North Carolina, and we think they are residents of the State of North Carolina, as they intended to make this State their home when they moved to Midway Park. The question of intention enters into the acquisition of residence just as does the question of domicile. The courts of last resort in your county hold that even where the State has concurrent jurisdiction with the Military Authorities, a person living in the area where concurrent jurisdiction prevails, can acquire residence. I have gone into this matter thoroughly in connection with the question of the voting rights of persons residing in Midway Park. I see no reason, therefore, to quote from the opinions of Supreme Courts of the various States on the subject.

We are of the opinion, therefore, that those persons who moved to Midway Park before the Navy Department acquired exclusive jurisdiction, and who lived there for twelve months or more before exclusive jurisdiction was established, with the intent of making this State their home, have acquired residence for adoption purposes. Likewise, persons who reside off of the Military Reservation may acquire such residence even after the acquisition of exclusive jurisdiction.

OPINIONS TO PAROLE COMMISSION

CRIMINAL LAW; PURSUING OR INJURING LIVESTOCK WITH INTENT TO STEAL; PUNISHMENT; LARCENY

6 March 1947

I reply to your letter of February 27, 1947. Briefly you state that John Smith and Ed Brooks were indicted for violating Section 14-85 of the General Statutes. You quote the bill of indictment which charges in substance that they shot and killed a hog which was the property of Ernest Brown and of the value of \$75.00. At the November Term 1946 of Beaufort County, Ed Brooks failed to appear and was not tried. John Smith tendered a plea of guilty and the court sentenced him to five years in Central Prison. Later, Ed Brooks was tried at the January 1947 Term of Court and was found guilty by the jury. The evidence offered at his trial fixed the value of the hog at \$37.50. The court was of the opinion that since the value of the hog was \$37.50, that the maximum punishment could not exceed two years and, therefore, sentenced Ed Brooks to two years in prison.

You say that counsel for John Smith now contends that his sentence should be commuted to two years, since two years is the maximum punishment that could have legally been imposed had he been tried and the value of the hog fixed at \$37.50, which was the value fixed when Ed Brooks was tried on the same bill of indictment and in connection with the same hog.

The statute under which these men were indicted is as follows:

"If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending."

Since the offense is punishable as if the men had been convicted of larceny, we therefore call your attention to Section 14-72 which fixes punishment for larceny where the value of the property does not exceed \$50.00, and which is as follows:

"The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than fifty dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

If the value of the property exceeds \$50.00, then the crime is punishable as is any felony and is governed by Section 14-70 and Section 14-2 of the General Statutes.

Since John Smith entered a plea of guilty to a bill of indictment which fixed the value of the hog at \$75.00, then of course, the sentence of five years in Central Prison does not exceed the punishment allowed by law, and in such case we advise that a sentence of five years is within the statute. Likewise, since Ed Brooks was tried and the value of the hog was fixed at \$37.50, or less than \$50.00, that under Section 14-72 above-quoted, the maximum punishment was two years. Where a crime is declared to be a misdemeanor without fixing a definite amount of punishment, two years has not been held to be excessive.

In our opinion, therefore, the court in each of these cases has given a sentence that is warranted by law. Since the value of the hog was actually fixed at \$37.50 in the case of Ed Brooks, and although John Smith entered a plea of guilty to a bill of indictment which fixed the value of the hog at \$75.00, I would think that this would be a proper element to be considered by you upon an application for commutation in behalf of John Smith. I don't wish to get into the scope of your parole work, but since the value of the hog has actually been fixed below \$50.00, it seems to me that this would be a strong consideration in favor of John Smith, even though he did plead guilty to what appears to be an excessive valuation.

H. B. #412; COMPENSATION FOR PERSONS ERRONEOUSLY
CONVICTED OF CRIME

21 June 1947

In your letter of the 20th of June, 1947, you request an opinion from this office as to whether or not a person otherwise qualified for compensation under House Bill #412 would be entitled to compensation for time spent in the county jail awaiting trial prior to his conviction.

Section 1 of the above named Act provides in part as follows:

"Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, . . . Section 3 of the Act, after setting forth the procedure for determining whether or not a person is entitled to compensation under its terms and authorizing the payment of compensation for erroneous conviction and imprisonment, refers back to Section 1 by use of the language, "such erroneous conviction and imprisonment."

It is thought that the language used in the Act indicates a clear intention on the part of the Legislature to confine the compensation therein authorized only to the time elapsing subsequent to actual trial and conviction and to the time actually served in a State prison.

In view of the above, it is not thought that a person otherwise qualified for compensation under the Act would be entitled to compensation for time spent in a county jail prior to his trial and conviction.

pardons; commutation; right of governor to commute
imprisonment to a fine

9 September 1947

In your letter of August 30th, 1947, you ask our opinion as to whether or not the Governor has the authority to commute the sentence of a defendant sentenced to the roads to a fine without a road sentence prior to the time of his commitment.

You are advised that the Executive of this State, of course, has the authority to commute sentences; but he cannot change a sentence from one form to another. If the Executive could do this, he would be exercising judicial function. The imposition of a sentence is a judicial matter, and a commutation must pertain to the sentence as imposed by judicial authority. If the Governor could change a road sentence to a fine without a road sentence, he would be exercising judicial authority in that he has changed the judgment of a court and imposed an entire new sentence.

We answer, therefore, that in our opinion, the Governor cannot take the course of action set forth in your letter.

OPINIONS TO BOARD OF CORRECTION AND TRAINING

BOARD OF CORRECTION AND TRAINING; BOARD OF PUBLIC WELFARE;
CONSTITUTION, ARTICLE XI, SECTION 7, SUPERVISION OF
CHARITABLE AND PENAL INSTITUTIONS

6 September 1946

I received your letter of September 4, referring to Chapter 776 of the Public Laws of 1943, now G. S., Chapter 134, Article 9, creating the Board of Correction and Training, and the question which has arisen in your mind in discussion with Mrs. Bost, former Commissioner of Public Welfare, and Dr. Winston, the present Commissioner, as to the possibility of the conflict of this law with the provisions of Article XI, Section 7, of the State Constitution.

You state that the question arises from the fact that the constitutional provision gives the Board of Public Welfare supervision of all charitable and penal institutions, and you inquire as to whether or not the training schools placed under the management of one Board of Directors, known and designated as the North Carolina Board of Correction and Training, would be in violation of that constitutional provision.

I observe from your letter that more than ten years ago the National Association of Training Schools withdrew its affiliation from the National Prison Congress and affiliated with the National Conference for Social Work, and you conclude that the answer to your problem may depend upon whether your institutions are to be classified as charitable or penal within the meaning of the constitutional provision referred to.

The General Assembly having enacted Chapter 776 of the Session Laws of 1943, it is not necessary for us as administrative officials to attempt to pass upon its constitutionality. In the absence of some decision by the Supreme Court of the State declaring an Act of the Legislature unconstitutional, administrative officials are bound by the terms of the law and it is the law, so far as we are concerned, unless and until the Supreme Court shall declare it a violation of the fundamental law found in the Constitution. *BICKETT v. TAX COMMISSIONERS*, 177 N. C. 433.

Whether or not the State Board of Public Welfare should have visitatorial or supervisory powers over the several training schools committed to the management and direction of the North Carolina Board of Correction and Training would have to be decided by us as administrative officials, in the light of the statute enacted by the General Assembly specifically prescribing the duties to be performed by the agencies set up by the General Assembly for carrying out the constitutional provisions. The constitutional provision in Article XI, Section 7, requires implementing legislation by the General Assembly and we are justified in assuming that all laws enacted to a constitutional mandate are constitutional until declared otherwise by the Supreme Court.

OPINIONS TO DEPARTMENT OF ARCHIVES AND HISTORY

ERA SURPLUS FUNDS; CHAPTER 252 PUBLIC LAWS 1941

29 July 1946

In your letter of the 25th of July, 1946, you submit a copy of Chapter 252, Public Laws of 1941, along with correspondence between yourself and Mr. Deyton, and the Hillsboro Branch of the Durham Bank and Trust Company, and inquire if you have any authority as custodian of ERA Funds, which have been turned over to your department under the authority of the above Act, to pay to the bank the sum of \$10.00 which it is claiming on account of a check issued by the N. C. Emergency Relief Administration to the payee named on the check and which was cashed by the bank but later returned marked "payment stopped".

Public funds of the State of North Carolina may not be withdrawn from the treasury except by virtue of some law authorizing such withdrawal. The Act authorizing the transfer of these funds to your department authorizes you to spend only so much of this fund as may be necessary for use in "classifying, administering, preserving and making available to the public the said records in accordance with the purpose of the funds. The said funds to be disbursed in accordance with and under the terms of the Executive Budget Act". The Act further provides that any balance remaining in the fund after the records of the ERA have been arranged, classified, catalogued, and made available to the public by your department shall revert to the State Board of Charities and Public Welfare.

It would appear that any just claim which the bank may have had against the old ERA should have been presented to that organization before its dissolution. The ERA along with all of its component organizations have long ago been dissolved and in the absence of any specific legal authority for the payment of claims such as the one presented by the bank you are advised that you have no authority to disburse any of these funds for the payment of claim such as that presented by the bank, or for that matter for any other purposes than those set out in the Act above referred to.

VANCE MEMORIAL COMMISSION; DONATIONS NOT REQUIRED TO BE DEPOSITED WITH STATE TREASURER

14 November 1947

I acknowledge receipt of your letter in which you state that the Vance Memorial Commission, created by a resolution of the General Assembly of 1943, has on hand some \$1,673.00 received from funds donated and that since such funds are not sufficient to carry out the purposes of the Commission, it is contemplated that donations will be refunded to

the donors upon request. You further state that you have recently been elected treasurer and that the former treasurer has sent you a check for the balance on hand.

You inquire as to whether or not this check should be handled through the treasurer's office or may be deposited by you to the credit of the treasurer of the Commission in a local bank. I understand that it has been the practice of the Commission in the past to permit the treasurer to handle the funds and to deposit the same to his credit as treasurer.

I do not think that the statute contemplates that the Commission will in any way handle any public funds but that funds received by them will be limited to donations by private persons, firms, or corporations. This being true I think that the practice heretofore followed by the treasurer of the Commission of depositing funds in the bank to his credit as treasurer is a proper course to pursue and that you may continue to follow this course.

OPINIONS TO BOARD OF BARBER EXAMINERS

STATE BOARD OF BARBER EXAMINERS; BARBER SCHOOLS; NOTICE AS TO REFUSAL TO ISSUE PERMIT

2 June 1947

I acknowledge receipt of your letter in which you raise the question as to the necessity of giving thirty (30) days' notice upon the Board refusing to issue a permit to a barber school. I understand from your letter and from my conference with Mr. Cheek that the question in which you are interested is whether or not your Board is required to give the thirty days' notice required in G. S. 86-21 before refusing to issue a permit to barber schools or colleges when the refusal is based on the grounds mentioned in G. S. 86-25.

Section 86-25 specifically provides that no permit shall be issued to any barber school or college in the State unless it meets all of the requirements set out in said section. I am, therefore, of the opinion that it is not necessary to give notice to a barber school or college before refusing to issue it a permit if it fails to meet the requirements of Section 86-25.

However, Section 86-20 of the General Statutes merely authorizes the Board to refuse to issue or renew permits on certain grounds mentioned in the section; and before you may refuse to issue, renew, or suspend, or revoke any certificate of registration for any one or for a combination of the grounds set out in G. S. 86-20, it is necessary to give the school or college thirty days' notice and provide them an opportunity to be heard, and if the decision of the Board is adverse to such barber school or college, it may appeal to the Superior Court which may reverse or modify any order made by the Board if it appears to the Court "that the law was not followed in said action."

BARBER EXAMINERS; LICENSE; FEE

14 October 1947

In your letter of the 10th of October, 1947, you enclose copy of an application from Ralph E. Young for a barber's license under the provisions of Chapter 940 of the Session Laws of 1947, and you inquire if under the provisions of the above Act, a person applying for a license would be entitled to one free of charge or if, before the issuance of such license, the applicant would be required to pay the required fee of twenty dollars (\$20.00), which is the fee allowed by law to be paid by all applicants to receive such license.

An examination of the above Act discloses that its only effect is to exempt veterans from taking the examination required by Chapter 86 of the General Statutes. The Act specifically provides in the last paragraph of Section 1 that the application must be accompanied "by the fees prescribed" under Chapter 86 of the General Statutes.

OPINIONS TO DEPARTMENT OF CONSERVATION AND DEVELOPMENT

GREAT SMOKY MOUNTAINS NATIONAL PARK; JURISDICTION

31 October 1946

I acknowledge receipt of your letter enclosing a copy of a letter from Governor Cherry and a letter and proposed bill from the United States Department of the Interior National Park Service relative to the jurisdiction of the United States over lands of the Great Smoky Mountains National Park which were conveyed to the United States by the State of North Carolina.

I understand from this letter and from talking with you that since the original conveyances were made pursuant to the 1929 Act the government has obtained additional tracts of land from sources other than the State of North Carolina. The bill is proposed so as to give the government the same jurisdiction over the lands acquired from private sources as it has over the lands acquired from the State by virtue of the 1929 Act. You inquire as to the necessity of this Act.

The original law was enacted by Chapter 48 of the Public Laws of 1927 and amended by Chapter 220 of the Public Laws of 1929. These acts of the Legislature cede to the Federal Government jurisdiction over all lands in North Carolina acquired by it for the Great Smoky Mountains National Park, but this jurisdiction seems to be limited to that portion of the land purchased from the State of North Carolina, as the 1927-29 Acts cede jurisdiction to the Federal Government over lands purchased from the State pursuant to the machinery set out in the Acts. It appears that the pertinent acts are not sufficient to cede jurisdiction to the Federal Government over lands not purchased from the State and pursuant to such acts.

I, therefore, am of the opinion that additional legislation will be necessary to cede jurisdiction over lands included in the park area not purchased from the State of North Carolina and pursuant to the machinery set up in the 1927-29 Acts. I am not now passing upon the sufficiency of the proposed bill.

Of course, the advisability of the policy of ceding jurisdiction over lands purchased by the Federal Government from individuals is a matter for consideration of your department and other interested administrative agencies.

CAPE HATTERAS SEASHORE COMMISSION; CONTRIBUTIONS TO; DEDUCTIBILITY AS TO FEDERAL INCOME TAX RETURNS

27 November 1946

Some days ago you discussed with me the question of whether or not donors to the Cape Hatteras National Seashore Commission are entitled to have their contributions deducted for Federal income tax purposes. At the same time you left with me a letter from Honorable E. I. McLarney, Deputy Commissioner, and an exemption affidavit.

As you know, the Cape Hatteras National Seashore Commission was created by Chapter 257 of the Public Laws of North Carolina for the primary purpose of acquiring property in the State of North Carolina for the purpose of establishing a national seashore park pursuant to an act of Congress, approved August 17, 1937, (50 Stat. 669). It does not seem to me that the proposed exemption affidavit is applicable to this case and I have, therefore, had a copy of the legislative Act made and am enclosing the same herewith, together with a pamphlet entitled, "Questions and Answers Concerning the Cape Hatteras National Seashore Recreational Area Project, North Carolina," which was prepared by the National Park Service of the United States Department of the Interior of 1941.

I suggest that you forward to the Treasury Department a copy of the North Carolina Legislative Act and the questionnaire so that the Commissioner will have such information as will enable him to determine whether or not contributions to the Commission are deductible for Federal income tax purposes.

AMENDMENT, ILMENITE LEASE AGREEMENT DATED FEBRUARY 26, 1942,
BETWEEN STATE OF NORTH CAROLINA (DEPARTMENT OF CONSERVATION
AND DEVELOPMENT) AND DU PONT TO INCLUDE ADDITIONAL
WATERWAYS

8 April 1947

Pursuant to your recent request I have compared the contents of the proposed amendments to the agreement between the E. I. du Pont de Nemours and Company and the State of North Carolina with certain provisions of a resolution of the Board of Conservation and Development as set out in your letter of February 1, 1946.

The proposed amendment is in proper and legal form but there is a deviation in the contract from that set out in your letter. In your letter it appears that the Board required to be inserted in the contract the following: "Provided any minerals, sand, gravel, and earth other than ilmenite retained by the party of the second part shall be paid for at a price or prices agreeable to the party of the first part." Paragraph C of Section 2 of the proposed amendment to the original contract contains this wording: "A reasonable sum to be agreed upon by the parties hereto." It will thus be noted that the resolution as passed by the Board states that the price is to be satisfactory to the State, but the contract provides for the price to be agreed upon by the State and the Company. I do not think that the wording contained in Paragraph C meets the requirement of the resolution of the Board set out in your letter.

It does appear at the end of Section 2 that the word "ton" and the words "gross ton" have been defined to mean 2240 pounds.

CONSERVATION & DEVELOPMENT; STATE PARKS; AUTHORITY TO COLLECT
FEES UNDER H. B. 610, SESSION 1947

17 June 1947

I acknowledge receipt of your letter in which you set out a schedule of fees which your Department proposes to collect from those using the service facilities of State-owned lakes.

You inquire as to whether or not you have legal authority to collect the fees set out in the schedule, and in particular, as to the fees for fishing permits.

House Bill #610, 1947 Session of the Legislature, specifically authorizes the Department to charge and collect reasonable fees for the use of boats and other craft, and the erection and maintenance of docks and piers on State-owned lakes. This bill specifically authorizes the collection of fees for permits for fishing in State-owned lakes, but such permits may be issued only to "holders of *bona fide* North Carolina hunting and fishing licenses" and on the condition "that all State game and fish laws and regulations are complied with."

I do not think that there is any question but what you may collect reasonable fees for the use of the service privileges and facilities mentioned in the bill, including fees for the issuance of permits to those entitled to receive the same to fish in State-owned lakes. Of course, I am not attempting to pass upon the reasonableness of the fees included in your schedule, as that is a matter for determination by the Board of Conservation and Development.

DEPARTMENT OF CONSERVATION AND DEVELOPMENT; AUTHORITY TO
SUBPOENA WITNESSES

25 June 1947

I acknowledge receipt of your letter in which you state that Mr. Henry Henderson has filed a claim with the Board of Conservation and Development for damages caused by a forest fire, and that such claim will be considered at the meeting of the Board at its summer meeting to be held in Morehead City. You state that Mr. Henderson has requested the Board to subpoena witnesses, and you inquire as to the authority of the Board of Conservation & Development to subpoena witnesses in hearings of the type requested.

I have carefully examined the statutes and I do not find any authority to subpoena witnesses in cases of the character of Mr. Henderson. The Act of the Legislature which authorized the Board to consider the claim of Mr. Henderson makes no reference to the method or procedure to require witnesses to appear at hearings before the Board.

I, therefore, conclude that the responsibility rests entirely upon Mr. Henderson to have present at the hearing any of his witnesses. I am rather inclined to feel that Mr. Henderson will have to depend upon the voluntary willingness of such witnesses to attend the hearing.

CRIMINAL LAW; OBSTRUCTION IN STREAMS BY FELLING TREES

28 August 1947

You have forwarded to this office a letter from the Halifax Paper Company, Inc. inquiring as to whether or not it is illegal to cut trees down into creeks or rivers and leave them in such a way as to obstruct small boat navigation.

I think that you will find the answer to this question in Sections 77-12 and 77-13 of the General Statutes, which sections read as follows:

77-12. "*Obstructing passage of boats.*—If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor."

77-13. "*Obstructing streams a misdemeanor.*—If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish-dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extended over more than two-thirds of the width of any stream, the said penalties shall attach."

However, Section 77-13, above quoted, was held in the case of *STATE v. POOL*, 74 N. C. 402, to apply only to navigable streams. The Court held in *STATE v. NARROWS ISLAND CLUB*, 100 N. C. 477, that the bed of a lake or water course may be private property, but if the waters are navigable in their natural state the public have an easement of navigation in them, which easement the owner of the soil cannot obstruct.

GAME LAW; FOREST WARDENS SERVING AS DEPUTY GAME PROTECTORS

21 November 1947

I acknowledge receipt of your letter of November 19 in which you inquire as to whether or not there is anything in Chapter 263 of the Session Laws of 1947 creating "The North Carolina Wild Life Resources Commission" which repeals the statute authorizing a state forest warden to serve as ex-officio game protector. I understand that you have discussed this question with Doctor Willis King, Director of the North Carolina Wild Life Resources Commission and that you and he do not feel that the 1947 Act in any way affects the authority of forest wardens serving as ex-officio game protectors.

I assume that you have reference to Section 113-92 of the General Statutes which reads in part as follows:

"All sheriffs, deputy sheriffs, police officers, *forest wardens*, park patrolmen, refuge keepers, constables and all other peace officers are hereby made deputy game protectors, and it shall be made their duty to aid in the enforcement of this law."

The following Section 113-93 makes all game protectors, deputy protectors, and refuge keepers ex-officio forest wardens and charges them with the duty of reporting to the forest wardens all infractions of the forest fire law and to assist forest wardens in extinguishing forest fires.

I do not find anything in the 1947 Act creating the North Carolina Wild Life Resources Commission, which in my opinion, has any effect on the two sections above quoted from so that all forest wardens are deputy game wardens and all game protectors, refuge keepers, etc. are ex-officio special forest wardens.

OPINIONS TO LOCAL GOVERNMENT COMMISSION

APPLICATION OF ASSESSMENTS FOR LOCAL IMPROVEMENTS

2 September 1947

I received your letter of August 29, in which you ask my opinion as to the correct interpretation of the language found in G. S. 160-397 which provides that "All money derived from the collection of special assessments for local improvements for which bonds or notes were issued shall be placed in a special fund and used only for the payment of bonds or notes issued for the same or other local improvements."

From a consideration of this section and the other related sections in the Municipal Finance Act, I am of the opinion that this language means that the money collected for special assessments shall be used to pay the principal and interest on the bonds or notes issued for the improvements for which the collection is made, or on bonds or notes of other local improvements for which bonds or notes had been issued. It does not mean, in my opinion, that the money collected for special assessments could be used to construct other special improvements or other local improvements but could be applied only upon bonds or notes issued for that purpose.

COUNTIES; MUNICIPALITIES; FISCAL CONTROL LAWS; EXPENDITURE OF SURPLUS FUNDS

7 October 1947

I have your letter of October 4 referring to my correspondence with Mr. D. B. Teague, Attorney for Lee County, and my last letter to him under date of October 2.

You state in your letter as follows:

"Does not the adoption of the appropriation resolution under G. S. 153-120 limit the spending by a Board of County Commissioners to the amount of appropriations contained in such resolution? Also, G. S. 153-130 provides that no contract or agreement requiring the payment of money, or requisition for supplies or materials, shall be made, unless provision for the payment thereof has been made by the appropriation resolution or through the means of bonds or notes duly authorized. If a Board of County Commissioners has failed to apply surplus in compliance with G. S. 153-122, even though such failure might have been unintentional or through oversight, under what authority may such unapplied surplus be appropriated within a fiscal year after appropriations have been fixed by the resolution adopted under G. S. 153-120?"

In the case of *GOSWICK v. DURHAM*, 211 N. C. 687, a suit was brought to restrain the City of Durham from expending tax derived funds for the construction of a municipal airport. On June 22, 1936, it appeared that the City of Durham had expended forty thousand dollars (\$40,000)

for the purchase of land for this purpose. The trial judge found that expenditure for the purchase of land for this airport was from available surplus revenues and in all respects valid.

In that case the plaintiffs asked that the Court order a sale of the land and the use of the funds for the reduction of taxes.

The opinion of Justice Devin states as follows:

"But we cannot hold that the purchase of the land was invalid or decree its sale. If it be conceded that a portion of the funds from which \$40,000 was paid for the property was derived from *ad valorem* taxes, this was an executed contract for the purchase of property, for an admittedly public purpose (chapter 87, Public Laws 1929). The acquisition of the land from surplus funds was not beyond the power of the city and it in no way offended the provisions of Article VII, sec. 7, of the Constitution. ADAMS v. DURHAM, 189 N. C., 232; NASH v. MONROE, 198 N. C., 306."

In the case of SING v. CHARLOTTE, 213 N. C. 60, Justice Devin, in a concurring opinion, states that he does not understand that on the record in that case the decision goes to the extent of holding that a city is without power, by appropriate resolution, to provide for the expenditure of money in its treasury applicable to general municipal expenses when this is done for the purpose of protecting and making essential repairs to property owned by the city and used for a public purpose. In this concurring opinion, Justice Devin refers to the County Fiscal Control Act and obviously had it under consideration. The cases relating to expenditure of surplus funds are reviewed by him in this opinion.

I understand these cases to hold that where it is ascertained by a county or municipality during the course of the year that it has surplus funds that are not derived from taxation, these funds could be expended for any public purpose by the adoption of an appropriate resolution making a supplemental appropriation therefor.

When the expenditure is for a necessary county purpose, such a supplemental resolution could be adopted and the expenditure of surplus funds, if such were available, whether derived from taxes or otherwise, could be made except, of course, funds derived from debt service levies and for special purposes.

It is, therefore, my opinion that the adoption of an appropriation resolution under G. S. 153-120 does not absolutely limit the board of county commissioners to spending the amount of the appropriations contained in such resolution. Expenditures could be made from surplus funds as above set out by the adoption of a supplemental appropriation resolution which has, I believe, been a common practice in this State.

MOUNTAIN RETREAT ASSOCIATION; APPLICATION OF LOCAL GOVERNMENT ACT

3 December 1947

I received your letter of December 2, in which you ask my opinion as to whether or not the provisions of the Local Government Act are applicable to the Mountain Retreat Association, known as Montreat, a body

politic and corporate, created by Chapter 196 of the Public Laws of 1897, as amended and supplemented by various Acts of the General Assembly which are collected in the booklet issued by this Association.

You call attention to G. S. 159-42 of the Local Government Act, which states that the provisions of the article shall apply to every unit having the power to levy taxes *ad valorem*.

I have examined the provisions of the several Acts constituting the composite charter of the Mountain Retreat Association which are collected in the booklet referred to. Section 5 of the Act, as you state, provides that the corporation shall have power to levy and collect assessments upon property situate within its territory for the good government, management and general expenses of the corporation, and for the comfort, convenience and well-being of the occupants of its territory *as may be provided and agreed upon in any deed of sale or lease by said corporation to any grantee or lessee*.

Section 8 provides that the Association or the Board of Directors may levy and collect assessments and taxes upon all lands, property and polls within its territory under such rules and regulations as shall be prescribed by the Board of Directors of the said corporation.

Section 2 of the Act gives the Association very broad powers, including the power to issue bonds or evidences of indebtedness and to secure the same in such manner as may be deemed advisable upon real estate, leases, rights, privileges, rents or any other property of the said corporation.

You call attention to the fact that the conveyances which have been made of property by the Association are on forms of deeds, which are set out in the booklet, which provide that the lands conveyed should be owned and held, subject to the payment of assessments and taxes to be annually levied and assessed against said lands not to exceed one per centum of the values of said lands and premises when the value exceeds the sum of \$500.00, as valued by the first party or its successors or a proper officer duly designated by it, and not to exceed \$5.00 when its value is less than \$500.00. This provides that taxes are to be levied annually and collected by a tax collector appointed by the Trustees, with the power of the sale of property in the event of default in the payment of these taxes or assessments.

You state that since the powers mentioned are obviously exercised under a contractual arrangement with the grantee in each conveyance of property, you ask my opinion as to whether or not the charter confers upon the corporation the power to levy taxes *ad valorem* and my opinion concerning the application of the Local Government Act to this corporation.

The statutes mentioned do provide for the levy of what are called assessments or taxes on an annual basis, based upon the value of the property taxed to the extent provided in the charter, to which reference has already been made. The use of the word "assessments," I think, is appropriate to the purposes to which the impositions are authorized, but the use of the word "taxes" is inaccurate, as taxes can be levied only by public corporations for public purposes. See, COMMISSIONERS v. DAVIS, 182 N. C. 140.

It, therefore, must be assumed that the use of the word "taxes" in Section 8 of the Act is the equivalent of the use of the word "assessments," which is provided in Section 5 in which the corporation is authorized to make limited exactions from those to whom property is sold. Taxes can be levied only for public purposes. NORTH CAROLINA CONSTITUTION, Article V, Section 3.

The Acts creating the Mountain Retreat Association are very similar to the provisions of Chapter 419 of the Laws of 1909, creating the Southern Assembly of the Methodist Church. Without stopping to make the comparisons in the two laws which are striking, it is sufficient to say that the Court, in the opinion in that case, said that the plaintiff, however high its aim and purpose was, was in its form and controlling features a business enterprise on which municipal powers have been incidentally conferred in promotion of the primary purpose. In this case the Court held that the property of the Southern Assembly was not exempt from taxation as a municipal corporation within the meaning of Article V, Section 5, of the Constitution, as it concluded that the corporation was created from private as distinguished from public purposes, although incidentally exercising quasi-municipal powers.

This case is to be distinguished from *WEBB v. PORT COMMISSION*, 205 N. C. 663, and *WELLS v. HOUSING AUTHORITY*, 213 N. C. 744, as was pointed out in the opinions in both of these cases.

In view of the decision of the Supreme Court of this State in the Southern Assembly case, I am of the opinion that the Mountain Retreat Association is not a municipal corporation but a private corporation created for the purposes for which it was organized and having certain functions of a governmental character. I am of the opinion that it does not have the power to levy taxes within the sense that this phrase is used in the Municipal Finance Act, G. S. 159-42. I, therefore, think that the Mountain Retreat Association is not subject to the provisions of the Local Government Act.

For the same reason, I conclude that the financial operations of this Association are not subject to the Municipal Finance Act, Article 28 of Chapter 160 of the General Statutes. In many particulars, obviously the provisions of the Municipal Finance Act would be totally inapplicable to this corporation.

LEGAL PUBLICATIONS; EFFECT OF AMENDMENT TO G. S. 1-598 BY
CHAPTER 213, PUBLIC LAWS OF 1947

28 April 1948

I received your letter of April 26 and it seems to me that the observations which you have made, as to the effect of the amendment to G. S. 1-598 made by Chapter 213 of the Session Laws of 1947, are entirely correct.

The statute, G. S. 1-598, formerly provided that such legal notice or other legal advertisement published in any such newspaper filing such sworn statement as therein provided "shall be valid." The rewriting of this section by Chapter 213 of the Session Laws of 1947 provides that

the filing of the affidavits shall be "*prima facie* evidence that the newspaper named was at the time therein stated a qualified newspaper . . ."

I agree with you that the publication might be attacked on the grounds that the newspaper employed did not have the requisite qualifications and that the *prima facie* presumption created by the statute could be met by an actual showing of the lack of qualification. All of this, however, would be subject to an action being brought in thirty days after the publication, as provided by G. S. 153-100 of the County Finance Act. If the action questioning the validity of the bonds was not brought within this time, the question as to the character of the publication would be thereby foreclosed.

In view of the fact that the benefits of the old statute are lacking, I would suggest that consideration be given to an amendment at the next session of the General Assembly to restore a provision having the effect of the previous one.

OPINIONS TO LIBRARY COMMISSION

PUBLIC LIBRARIES; JOINT LIBRARIES; MEMBERSHIP ON BOARD OF TRUSTEES

28 September 1946

In your letter of the 27th of September, 1946, you inquire if, since the passage of the 1945 Amendment to G. S. 160-77, the membership on the Fontana Regional Library should be increased, in view of the fact that the 1945 Amendment increased the number of the trustees from two to three persons from each of the participating units. It is the opinion of this office that the membership should be increased as there are now vacancies on this Board. Vacancies, of course, would be filled by the governing body of the units concerned.

GASOLINE TAX; COUNTY OWNED BOOKMOBILES; EXEMPTION

28 October 1947

I have your letter of October 24, 1947, in which you state that there are forty-three county owned bookmobiles now operating in the State of North Carolina. These bookmobiles are equipped with "P" licenses. In the near future the number of bookmobiles will be increased to sixty-four. You inquire if there is any way by which gasoline purchased to operate these bookmobiles can be acquired without paying the North Carolina gasoline tax.

The only exemption from the per gallon tax levied on gasoline to be used in motor vehicles to be operated over the highways of the state is for school busses, service trucks and gasoline delivery wagons used only for school purposes. G. S. 105-449. I am informed that all state agencies and departments pay this per gallon tax and that the department allows an exemption only for the school vehicles mentioned above. This interpretation is supported by the statute. It is, therefore, with regret that I advise that, in my opinion, gasoline purchased to be used in these bookmobiles is subject to the North Carolina per gallon tax levied by subchapter V on motor fuel.

OPINIONS TO BURIAL ASSOCIATION COMMISSION

N. C. BURIAL ASSOCIATION COMMISSION; CHRISTIAN UNION RELIEF SOCIETY
NOT SUBJECT TO ARTICLE 24 CHAPTER 58 OF THE GENERAL STATUTES

16 April 1948

I acknowledge receipt of your letter of April 1 enclosing brief filed on behalf of the North Carolina Burial Association Commission and brief prepared by Honorable H. P. Whitehurst and Honorable George B. Riddle, Jr., Attorneys, on behalf of the Christian Union Relief Society of Mattoxville.

You request my opinion as to whether or not the Christian Union Relief Society is a mutual burial association and subject to Article 24 of Chapter 58 of the General Statutes.

I have given careful consideration to the briefs filed, but from the meager facts set out therein I am unable to definitely determine whether or not the society comes within the purview of the pertinent statute.

The statute does not define what constitutes a mutual burial association nor set up a standard by which I can determine whether the organization in question is in fact a mutual burial association. Article 24 seems to contemplate that a mutual burial association is one engaged principally in providing burial benefits to its members and that such benefits would be the principal object and purpose of the organization, and not merely incidental to its operation. The briefs of both your commission and the society show that the Christian Union Relief Society was organized in 1901 but suspended operation from 1926 to 1932, but has continued its operation since that date. Article 24 was not enacted in law until 1941. This society has continued to pursue its objectives and has not heretofore been considered as a mutual burial association. The briefs indicate that this society is primarily a relief or charitable organization, the members originally being members of the Methodist and Baptist Churches of Mattoxville, and was organized for the purpose of administering to the general needs of its members and that the burial feature of the society is merely incidental to and not its main purpose. It will be noted that the society furnishes other benefits to its members and provides general relief for the poor and unfortunate members. From its beginning it has called itself the Christian Union Relief Society and has not held itself out as a mutual burial association.

I have discussed this matter with you, and from the briefs and from other facts which I have been able to ascertain, I am inclined to the opinion that the Christian Union Relief Society is not subject to the provisions of Article 24 of Chapter 58 of the General Statutes. There may be other facts, with which I am not acquainted, which might alter my opinion, and if you have any such facts and care to present them I will be glad to consider the matter further.

OPINIONS TO MERIT SYSTEM COUNCIL

MERIT SYSTEM LAW; PLAN OF COMPENSATION UNDER MERIT SYSTEM; ON THE JOB TRAINING BENEFITS PAID BY FEDERAL GOVERNMENT TO TRAINEES EMPLOYED UNDER MERIT SYSTEM

21 August 1946

In your letter of August 13, 1946, you present the question as to whether or not an employee of a local health unit may receive in addition to compensation for the classification he now holds under the Merit System, "on the job training" benefits paid by the Federal Government. You state that such benefits would make up the difference between the employee's compensation in accordance with the uniform compensation plan adopted by the Merit System Council, and the compensation in the classification for which the employee is being trained. You explain that the classifications under the Merit System are usually set up in series and that there are several grades or levels in a particular line of work. An employee may advance from a lower to higher grade upon completing certain requirements of additional experience; and in some cases, additional training in the line or series in which he is pursuing. All advancement, however, is subject to the employee's passing a merit examination for the higher grade, being reached on the register and the actual availability of a position in the higher classification. You emphasize the fact that it is easy to determine the position for which a person is training but that his actual appointment is contingent upon a number of factors.

As related to your first question, above stated, you would like to be informed if payment of "on the job training" benefits is in accordance with the Merit System Law and Rule, particularly Article IV of the Rule.

The so-called "on the job training" benefits paid to veterans of World War II are a part of the educational plan for the benefit of these veterans, and it is not deemed necessary in this letter to discuss the Federal statutory basis of these benefits. While it is true that the Assistant Director of the Budget issued Budget Memorandum No. 338 which in substance states a policy against on the job training in State agencies, I am now informed by the Assistant Director of the Budget that this policy has been reconsidered; and so far as the Budget Bureau is concerned, there is now no objection on the part of the Budget Bureau or the State to the use of State agencies for the purposes of on the job training if such agencies contain positions that can be adapted to that purpose and if such agencies are certified for that purpose.

I am told that before an employer, agency, or appointing authority can be certified as an eligible agency for on the job training, such agency, employer or appointing authority must make an application to the Veterans' Education Committee at State College here in Raleigh. Mr. J. E. Taylor, Room 112, Tomkins Hall, of State College, is Secretary of the Veterans' Education Committee. If this committee decides that the particular em-

ployer, agency or appointing authority meets the requirements for furnishing on the job training, then it issues its certificate or approval; and as I am informed, the decision of this committee, so far as the Federal Government is concerned, is final. The veteran desiring to receive on the job training benefits must also make an application to the Raleigh office of the Veterans' Administration, and his application must be passed on and approved before he is eligible for such benefits.

So far as I can see, there is nothing in Article IV of the Merit System Rule which prohibits the payment of on the job training benefits to persons employed by agencies operating under the Merit System Law and Council. Of course, any agency operating under the Merit System Council, assuming that it has on the job training employees, will continue to operate under the Merit System and to make all salary payments according to the Merit System salary plan. There, of course, cannot be any deviation so far as the expenditure of State funds is concerned under the Merit System salary plan. The regular step increases in salary and the advancements to higher positions in series or transfers to positions in other series must always continue to be according to the Merit System Regulation, examinations and appointment of eligibles from registers. The money paid in the form of benefits to an on the job trainee by the Federal Government is not regarded by the Federal Government as salary. It is a sum of money paid to such person as subsistence while training for a higher position, and it is contemplated that in many instances the person will receive regular salary from the employer or agency concerned. This money is paid under Federal statutes and regulations because the recipient occupies the particular status of a veteran and is never regarded by the Federal Government as a salary supplement. In view of these circumstances, I do not think that we should regard such funds as a salary supplement since we are not concerned from a Merit System standpoint with the concept of the Federal Government or the status that the employee has with the Federal Government because he is a veteran.

As to whether or not any of the agencies or appointing authorities operating under the Merit System desire to qualify or can qualify as being eligible for furnishing on the job training is a question of policy with which this office, of course, is not concerned. As to whether any of the agencies can qualify under the standards of the Veterans' Education Committee is a question exclusively left to that committee. As to whether or not the Veterans' Administration will permit the veteran applicant to receive these benefits is still another question with which we are not concerned. In our opinion, however, there is nothing in the Merit System Law or regulations which prohibits an agency operating under the Merit System from qualifying for the purpose of giving such training if it desires to do so and if the Veterans' Education Committee certifies that it is eligible. I think it is entirely a question to be decided by the agency itself, the Veterans' Education Committee, and the veteran employed in the agency. The question of the amount and instruction that such person receives, to my mind, is a matter to be reviewed and considered by the Veterans' Education Committee in passing on the qualifications of the agency.

MERIT SYSTEM COUNCIL; VETERANS' PREFERENCE IN STATE EMPLOYMENT;
G. S. SECTIONS 128-15 AND 128-15.1; MEANING OF
THE WORD "DISABLED"

9 March 1948

You call attention to H. B. No. 33 of the Public Laws of 1939, giving preference to veterans in employment. This Act will be found in the General Statutes as Sections 128-15 and 128-15.1. You state that you have the case of a wife of a veteran who is claiming a preference under the Act. The husband is receiving \$11.50 per month because he has a ten-per-cent disability. This disability is the result of a foot condition that was aggravated by war service. You doubt if this disability is great enough to keep this man from working. You inquire if there has been a definition of the disability clause in this Act and under what circumstances wives of disabled veterans receive a veteran's preference for merit examination purposes.

Section 128-15 of the General Statutes gives a preference rating of ten per cent in all examinations of applicants for positions with the State if such applicant has served the State or the United States honorably in certain corps or divisions of the armed forces. As to widows and wives of such veterans, a proviso to the statute is as follows: "Provided, that the provisions of this section shall apply to widows of such veterans and to the wife of any *disabled* veteran." (*Italics ours*).

It will be noted that the term used is "disabled," and there does not seem to be any degree or qualification as to the disability; that is, it is not designated as partial, total, permanent or temporarily total disability. I think that we should look to the manner in which the Government has handled this matter in the preferences given to veterans and their wives in the Civil Service. Under the provisions of the Act granting preference to veterans in Government employment, as contained in 5 U.S.C.A., Section 851, you will find that veterans who have a service-connected disability are given a preference; and as to wives, the Act of Congress states "the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any Civil Service appointment."

You will find that on October 19, 1945, the President issued an executive order, which is No. 9644, (See U. S. Code Congressional Service, page 1325.), in which the Civil Service Commission was authorized to confer a competitive classified Civil Service status upon certain disabled veterans. It is very noticeable that in this executive order, this status could be conferred when the veteran established "the present existence of a service-connected disability of not less than ten per cent." I call your attention to this executive order for the reason that it shows that the Government recognizes a disability of ten per cent for Civil Service purposes, in granting preferences. Of course, our statute does not say that the disability must be service-connected.

I am of the opinion, therefore, that the wife in this case should be classed as a wife of a disabled veteran within the meaning of our statute and that such a preference should be granted in any Merit System Examination for State employment. I doubt if I can, at this time, give you any hard and fast criterion that would be determinative of all questions involved in the

word "disabled." I think it would be safe, however, to follow the adjudications of the Veterans' Administration on such matter, remembering, however, that, under our statute, a veteran can be disabled although the disability is not service-connected. In this respect, the determination of the Veterans' Administration would not be safe to follow since the Administration may determine that the veteran is disabled but the disability is not service-connected and, therefore, deny his claim when he would be disabled and entitled to a preference under our statute.

OPINIONS TO BOARD OF EXAMINERS OF PLUMBING AND HEATING CONTRACTORS

STATE BOARD OF EXAMINERS OF PLUMBING AND HEATING CONTRACTORS;
APPLICATION OF CHAPTER 52 OF THE PUBLIC LAWS OF 1931;
REQUEST FOR LICENSE WITHOUT EXAMINATION

3 November 1947

I have before me application of Floyd Miller of Waynesville, North Carolina, requesting that he be granted license as a plumbing and heating contractor without examination. This application is accompanied by various affidavits supporting the facts in his case and photostatic copy of license to practice plumbing and/or heating contracting issued to L. A. Miller and photostatic copy of affidavit made by L. A. Miller on the second day of September, 1937. This is what is popularly known as the Grandfather Clause of your Act; and it provides in substance that all persons engaged in plumbing and heating business and holding State license should receive his or their license or renewal thereof to engage in said business without examination. This Act applied to cities and towns of more than 3500 population and remained in original Act until March 30, 1939. When the original license was issued to L. A. Miller, he was operating the firm of L. A. Miller Plumbing Company; and it is satisfactorily established by the affidavits that at that time, Mr. Floyd Miller was a part owner and actively engaged in this partnership and has been so actively engaged for the past twenty-five years. It was the impression and understanding of Mr. Floyd Miller, and other members of this firm, that the issuance of this license in the name of L. A. Miller covered the operations of the partnership, including all members of same. It appears now that L. A. Miller and R. E. Miller, former partners in the firm, are now dead; and Floyd Miller is the sole owner of the business created by this partnership and is now engaged in business under the name of Floyd Miller Plumbing Company of Waynesville, North Carolina.

The exhibit satisfactorily established that Floyd Miller has been constantly associated with the L. A. Miller Plumbing Company; and since the death of the other two partners, Floyd Miller has assumed responsibility for the operations of the firm. This has been established by affidavits of reputable citizens and officials, including the Judge of the Twentieth Judicial District. It has further been established that Floyd Miller has always enjoyed an enviable reputation in the practice of the business of plumbing and heating and that he has so engaged in such profession practically all of his life.

On September 2, 1937, L. A. Miller, of Waynesville, North Carolina, made application to the Board for license without examination and established the fact that he was engaged in the plumbing and heating business on February 27, 1931, and that he held himself out to the public in that capacity in the Town of Waynesville. It was further established that the business

was operated in accordance with Section 155 of the North Carolina Revenue Act and had not violated the provisions of Chapter 52 of the Public Laws of 1931. The Board has in its possession a copy of license number 47441 issued by the Revenue Department in the name of L. A. Miller which covers the fiscal year of 1930-31. The Board, therefore, issued license number 387, inclusive of plumbing and heating contracting, in the name of L. A. Miller of Waynesville, North Carolina, which was done on September 3, 1937.

In carrying out the provisions of the Act, the Board issued license to all persons who established the fact that they were engaged in the business of plumbing and heating on February 27, 1931, and who were holding a license in accordance with Section 155 of the Revenue Act. The Attorney General's office had ruled in this connection that a license issued by the Revenue Department in the name of a partnership was valid for the issuance of a license to each of the individual partners without examination. It clearly appears that the application for license to practice plumbing and/or heating contracting in North Carolina was signed by L. A. Miller, but the handwriting in the rest of the application is that of some other person. It further appears that L. A. Miller signed an affidavit in his own handwriting setting forth his length of practice, but this affidavit is typewritten; and I think we are justified in the inference that L. A. Miller did not prepare either one of these instruments, but they were prepared by another person or persons and signed by him. It has further been the experience of the Board to find that the Revenue Department, in many instances, did not issue licenses in the name of the firm but merely issued its license in the name of one of the owners of the firm.

I think, therefore, we have the situation where, under the law in existence at that time, each member of the Miller Firm in Waynesville, North Carolina, was entitled to have a license issued to him to practice the business or profession of plumbing and heating contracting. It is perfectly apparent that each member of the firm considered that all had been done that was required under the law and that each one was fully protected in his right of license to practice plumbing and heating contracting. We are further justified in inferring that R. E. Miller and Floyd Miller relied upon L. A. Miller, who appears to have been the dominant figure in the firm, to see that each member of the firm acquired the necessary legal right and license to practice this business or profession and that L. A. Miller, through inadvertence or a misunderstanding of the law, merely signed some papers, that is the application and affidavit prepared by someone else and laid before him.

You ask this office if your Board now has the right to issue Mr. Floyd Miller a license to engage in the business or profession of plumbing and heating contracting.

I am of the opinion that, under the circumstances in this case, your Board does have the right to exercise the necessary powers to the end that that which should have been done in 1937 shall now be done. It was the full intention of the laws regulating the profession or business of plumbing and heating contracting that those persons who had formerly practiced this business and had acquired a reputation as being skillful men and who had to their credit a length of practice should automatically be admitted and

licensed to continue this business or profession. Upon examining the various acts which fix the powers and duties of the various licensing boards, we find that this principle is universal and is based upon natural principle of justice and right. The same thing happened in the medical profession, and we are all familiar with the doctors who were allowed to practice under the so-called Grandfather Clause, even though they never received any license from the Medical Board created to regulate the practice of that profession. I think that this situation is analogous to a practice of the courts in dealing with similar situations. It has long been customary for our judicial tribunals to issue judgments or decrees *nunc pro tunc*. This Latin phrase simply means that a court applies its judicial power and permits acts to be done after the time when they should be done with a retroactive effect: that is, with the same effect as if regularly done. On this particular point, see the cases of PERKINS v. HAYWOOD, 31 N. E. 670 (Ind.); REINHART v. REINHART, 110 A. 29 (N. J.); EX PARTE SCHANTZ, 144 N. W. 45 (N. D.)

I am of the opinion, therefore, that your Board has the power and authority to consider all of these affidavits and exhibits; and if you are satisfied that the facts are established, as they seem to be, and that the applicant did have the necessary length of practice or was engaged in the active practice of the business or profession of plumbing and heating contracting on February 27, 1931, or the date applicable under Chapter 52 of the Public Laws of 1931, and that the applicant, due to misunderstanding of his rights, mistake and mere inadvertence as to the proper procedural steps, did not make the necessary application at that time, then your Board has authority to now enter an order issuing a license to this applicant, reciting that it should have been issued on February 27, 1931, and that it is issued now for then or it may be that the more appropriate date would be September 2, 1937, which seems to be the date on which L. A. Miller made his application.

In view of the facts and circumstances in this case, we are of the opinion that Floyd Miller is entitled to a license to operate the business or profession as a plumbing and heating contractor and that this license should be issued by your Board without examination.

PUBLIC HEALTH; PLUMBING AND HEATING; HEALTH ORDINANCES;
DUTIES OF COUNTY BOARDS OF HEALTH

24 June 1948

In your letter of the 22nd of June, 1948, you state that under the provisions of your licensing law, it applies only to cities and towns of more than 3500 population and that by reason of this limitation, there arises much damage to property and that health hazards are being daily created in many unrestricted areas.

You inquire if a County Board of Health has the authority to prescribe a rule or regulation whereby those who install plumbing in these unrestricted areas should first be required to comply with the provisions of your licensing act as to standards, by being required to secure a license from your Board before beginning such installations.

This matter has been considered by the staff of this office; and it is the opinion of this office that in view of the fact that the General Assembly has specifically provided that it shall not apply to cities and towns of less than 3500 population, no authority exists for a County Board of Health to pass an ordinance making the same applicable to the unrestricted areas to which you refer.

Of course, as you point out, G. S. 130-19 authorizes County Boards of Health to make rules and regulations as, in their judgment, may be necessary to protect and advance the public health of the county, and that under the provisions of G. S. 130-20, a violation of any such rules and regulations by any person is made a misdemeanor. However, it is the opinion of this office that the language of these two statutes would not have the effect of authorizing a County Board of Health to adopt as an ordinance your State Licensing Act.

OPINIONS TO N. C. MEDICAL CARE COMMISSION

ELIGIBILITY OF HOSPITALS TO RECEIVE CONTRIBUTIONS FOR INDIGENT PATIENTS UNDER HOSPITAL CARE PROGRAM

4 September 1946

Reference is made to your letter of August 31, 1946 with which you transmitted certified copies of charters of a number of hospitals incorporated in this State. You requested that we examine these charters and advise you in so far as the charters are concerned as to the eligibility or non-eligibility of these institutions to receive State funds as provided by the act creating the Medical Care Commission and Program of Hospital Care, the same being Article 13 of Chapter 131 of the General Statutes (Cumulative Supplement of 1945).

Section 131-119 of the General Statutes deals with contributions for indigent patients and authorizes the North Carolina Medical Care Commission to approve hospitals eligible to receive such contributions. A part of the section reads as follows:

"Provided that the benefits of this section shall apply only to hospitals publicly owned, or *owned and operated by charitable, nonprofit, non-stock corporations* * * * (Italics ours.)

In construing the words in italics in the above quotation, the Attorney General issued an interpretation dated some few weeks ago in which, among other things, he said:

"These words mean, in my opinion, the hospitals in which no individual stockholder can under any possible circumstances receive any profits or earnings of the corporation. If it has this quality, it would be considered as a charitable, non-profit corporation. The law provides for the organization of non-stock corporations, which are corporations which do not issue capital stock but has a membership elected as may be prescribed by its charter or by-laws. In the event you have any particular instance to pass upon, it would be well to submit us a copy of the charter of the corporation in order that you might be advised as to its legal character."

From the language of the statute, it is plain that these hospital institutions may operate under any form of organization if publicly owned. If they are not publicly owned, their form of organization must be that of a corporation. Contributions, therefore, cannot in any case be made to a hospital institution not publicly owned unless it is organized as a corporation in addition to the other requirements. I think that the character of an institution of this nature, that is to whether it is charitable or not, must be determined not only from the powers and purposes defined in its articles of incorporation or charter but also from the manner in which it is conducted. If a hospital has the status of a charitable institution, the fact that patients who are able to pay are required to do so does not necessarily deprive the hospital of its charitable character. On the contrary, if a hospital is conducted for profit, the fact that it receives free of charge patients unable to pay does not make it a charitable institution.

It is to be understood, of course, that so far as we are concerned we are only passing upon the requisites of the charters of these institutions. I have examined the charters of the hospitals and institutions set out below, and I am of the opinion that these charters meet the qualifications, in so far as the charters are concerned, of the language of the statute; and in this respect, they are eligible to receive contributions under the Medical Care Act provided further that your commission investigates the records and actual operations of the hospitals and finds that in its actual operations each institution is actually conducted as a charitable hospital or is a publicly owned hospital. The names of the hospitals recommended by us as to their charters are as follows:

Asheville Mission Hospital
Brunswick County Hospital
Charlotte Memorial Hospital
Gaston Memorial Hospital, Inc.
The Goldsboro Hospital
Grace Hospital, Inc.
Harnett County Hospital
Jubilee Hospital
Lincoln Hospital
The Mercy General Hospital, Inc.
Morehead City Hospital
The North Carolina Baptist Hospitals, Inc.
Park View Hospital Association, Inc.
Presbyterian Hospital
Randolph Hospital, Inc.
The Rex Hospital
Rutherford Hospital, Inc.
Saint Agnes Hospital, Inc.
Saint Joseph's Hospital, Inc.
Saint Luke's Hospital, Inc.
Scotland County Memorial Hospital, Inc.
Shelby Hospital
Stanly General Hospital, Inc.
Tayloe Hospital, Inc.
Thompson Memorial Hospital
Watts Hospital
The Wesley Long Hospital, Inc.

ELIGIBILITY OF HOSPITALS TO RECEIVE CONTRIBUTIONS FOR INDIGENT
PATIENTS UNDER HOSPITAL CARE PROGRAM

5 September 1946

You have heretofore been handed charters of certain hospitals about which we recommended that these hospitals were eligible to receive contributions for indigent patients under the Hospital Care Program so far as the charters are concerned, it being understood that you will investigate the actual operation of each hospital.

I am sending you with this letter another group of charters; and under the ruling of the Attorney General construing the words "hospitals publicly owned, or owned and operated by charitable, non-profit, non-stock corporations," we recommend that the charters handed you with this letter be accepted as showing institutions eligible to receive contributions for indigent patients, in so far as the charter is concerned. There is contained, how-

ever, in this group of charters certain exceptions which we describe below and which at the present time, because of the nature of the charter, we cannot recommend that these hospitals are eligible to receive these contributions. These hospitals are as follows:

1. *The Watauga Hospital, Inc.* The only thing sent to our office on this hospital are the by-laws of the corporation. No copy of the charter was sent; and we, therefore, could not review the charter. If and when you receive the charter, if you find that the charter compares substantially with the other charters that we have recommended, then you can find that the hospital is eligible so far as the charter is concerned.

2. *St. Leo's Hospital, Inc.* A reading of this charter discloses that it is not incorporated as a non-profit or charitable institution. Under the copy of the charter submitted to us, we, therefore, cannot recommend this hospital as eligible.

3. *H. F. Long Hospital, Inc.* This hospital does not appear to be incorporated or organized as a charitable, non-profit institution. We, therefore, cannot recommend this hospital as eligible so far as the charter is concerned.

4. *Masonic and Eastern Star Home of North Carolina, Inc.* This appears to be an institution owned by the Masonic Lodge. The charter states as follows:

"The purpose of said corporation shall be to build, operate and maintain a home for aged and indigent Masons, aged and indigent wives and widows of Masons and such other relatives of Masons as the by-laws shall provide for."

This appears, therefore, to be a charitable institution and is eligible in my opinion provided that it maintains a hospital and medical facilities. The charter does not disclose that the institution is operated as a hospital. If it actually maintains and operates a hospital for indigent Masons and relatives, then I think it would be eligible because I do not think that the fact that its charitable services are performed only for a restricted group would take it out of the definition of a charitable corporation. The result in this case will depend, therefore, upon your investigation.

5. *Onslow County Hospital, Inc.* This hospital does not appear to be incorporated as a non-profit institution. We, therefore, cannot recommend it as an eligible hospital.

6. *Pitt General Hospital, Inc.* This hospital does not appear to be incorporated as a non-profit institution. We, therefore, cannot recommend it as an eligible hospital.

7. *Petrie Hospital, Inc.* This hospital does not appear to be incorporated as a non-profit hospital. We, therefore, cannot recommend this hospital as an eligible institution.

8. *Good Samaritan Hospital, Inc.* This hospital from its charter does not appear to be incorporated as a charitable or non-profit institution. We, therefore, cannot recommend this hospital as eligible for contributions.

9. *Edgecombe General Hospital of Tarboro, N. C.* This hospital exists and appears to have been organized under a trust indenture executed by W. W. Green and wife, Sue B. Green, to Lyn Bond and others as trustees. This appears to be a true charitable hospital; but since it is a privately

owned and unincorporated institution, the form of organization does not meet the requirements of the statute; and we regret to be compelled to say that we cannot recommend this hospital as an eligible institution because of its form of organization.

10. *Davis Hospital, Inc., Statesville, N. C.* I do not find anything in the original charter showing that this is a non-profit hospital. There is an amendment to the charter changing the name of the corporation, and the application for the change of name makes the statement that it is a charitable and non-profit hospital. There is nothing, however, in the actual amendment or in the original charter sent to me that shows this to be the fact. We, therefore, cannot recommend this hospital as eligible.

11. *Chatham Hospital, Inc.* This hospital does not appear from its charter to be organized as a charitable or non-profit institution. We, therefore, cannot recommend this hospital as being eligible.

In the above cases which I have specifically called to your attention, it may be that these institutions do have amendments to their charters which were not sent to you and were, therefore, not laid before me. If you find such to be the case, you can place them on the eligible list so far as the charter is concerned. If any of the hospitals that we have rejected desire to amend their charter so as to become charitable, non-profit organizations from the charter standpoint, then upon the completion of such amendment, you can place them on the eligible list so far as the charter is concerned. I do not, however, think that a mere adoption of a by-law to such effect would be sufficient. In the case of Edgecombe General Hospital it seems to me that that institution will have to incorporate in order to be eligible.

With the exceptions noted above and as heretofore stated, the other institutions are recommended as eligible on the basis of their charters.

NORTH CAROLINA MEDICAL CARE COMMISSION; REQUIREMENT AS TO
HOSPITAL OWNING HOSPITAL TO SHARE IN CONTRIBUTIONS
FOR INDIGENT PATIENTS

2 November 1946

I received your letter of October 30, in which you refer to the provision of the Act creating the North Carolina Medical Care Commission, G. S. 131-119, which makes provision for contributions of one dollar per day for each indigent patient hospitalized in any hospital approved by the Commission, under certain conditions. You refer particularly to that part of the section which says that "the benefits of this section shall apply only to hospitals publicly owned or owned and operated by charitable, non-profit, non-stock corporations," and submit the question as to whether or not a hospital operated by a charitable, non-profit, non-stock corporation, but not owned by it, would be eligible to receive these contributions. You inquire specifically as follows:

"Although an exhaustive study has not been made, we believe the Commission has approved a few hospitals to receive its aid toward the cost of the care of indigents that are operated by community, non-profit, non-stock corporations that acquired possession of the hospitals from private owners by gift, purchase, or lease. If such corporations

acquired the hospitals at a fair price, whether by purchase or lease, and operate them on a creditable, non-profit basis, will not the intent and purposes of the law be satisfied? If not, will it not be advisable for the Commission to request the next Legislature to delete the word 'owned', If such a change should be necessary, what action, in the meantime, should the Commission take relative to the hospitals it approved which were leased on a fair basis from private owners by non-profit, non-stock community hospital boards or corporations?"

If the hospital has been acquired by the operating hospital by gift or purchase, it would clearly be the owner and, other requirements being satisfied, would be entitled to the benefits of the section. If, however, the corporation is not the owner of the hospital but merely has a lease on it, I am of the opinion that the language of the statute, "owned and operated," would not be satisfied as the holding of a lease would not be the equivalent of ownership.

I believe it would be desirable for the Commission to request the next Legislature to delete the word "owned" in the statute and I am quite sure the Legislature would readily do this, as the ownership of the property itself should not be a determining factor in making the contributions.

In the meanwhile, I believe it would be better to not actually make payments to a hospital which cannot legally comply with the statute, by reason of not owning the hospital property. These contributions could be set up in your bookkeeping and, if and when the General Assembly enacts a law which could be made retroactive authorizing the payments, they could be then paid over.

NORTH CAROLINA MEDICAL CARE COMMISSION; CERTIFICATION OF
INDIGENCY; COUNTY WELFARE OFFICERS

2 November 1946

I received your letter of October 30, referring to G. S. 131-120 of the Act creating the North Carolina Medical Care Commission, authorizing the Commission to adopt such rules and regulations as may be necessary to carry out the intent and purpose of the Act; and to G. S. 131-119, authorizing the Commission to contribute one dollar per day for indigent patients hospitalized in any hospital approved by it, and providing that the Commission shall promulgate such rules and regulations for determining indigency of the persons hospitalized and the basis upon which hospitals and health centers shall qualify to receive the benefits of this section.

You inquire as to whether or not, in my opinion, the county welfare department in the several counties in the State might, by rules and regulations of the Commission, be designated as the agency to certify as to the indigency of persons seeking aid for hospital care.

In my opinion, the Commission would have full authority to adopt rules and regulations of this character and I believe that they would be in all respects binding and effective. I believe, of course, that it would be necessary for the Medical Care Commission to adopt the rules and regulations for determining what would constitute indigency, and standards to be followed by the officials of the county welfare departments in reaching their determinations. These rules and standards being set up by the Commis-

sion, I see no reason to doubt that the county welfare officers might be designated as the ones to certify as to the indigency of a person coming within the rules and standards so established. The Commission in such cases would be merely adopting the finding made by the certifying officer of the welfare department.

STATE ADVISORY COUNCIL FOR THE MEDICAL CARE COMMISSION;
EXPENSE ALLOWANCES FOR ATTENDING MEETINGS

14 November 1946

I received your letter of November 13 and, as requested, have considered the question as to what amounts may be paid to members of the State Advisory Council to the Medical Care Commission, created by House Bill 594 of the General Assembly of 1945, for expenses for attending meetings.

You state that Mr. L. D. Moore, of the Budget Bureau, has stated to you that unless the per diem is specified in the law, the amount payable would be \$3.50 rather than \$7.00, which is paid the members of the State Medical Care Commission as provided in G. S. 131-117, which is a part of that Act.

Section 4 of Chapter 279 of the Session Laws of 1945, the Appropriations Act, provides for certain compensation to members of designated boards and commissions and concludes by providing as follows:

"All other boards and commissions, including those governing the institutions, but not including such as its members are now serving without compensation, \$3.50 per day and 5c per mile travel going and returning, and necessary travel expenses."

As the Act creating the Medical Care Commission and the State Advisory Council fails to fix any compensation for the members of the Advisory Council, I think Mr. Moore's advice to you is correct and that they would be entitled to receive, as provided by the statute above quoted, \$3.50 per day and 5c per mile for travel going to and returning from any meeting, and necessary travel expenses, which is limited by the Appropriations Act above mentioned, in Section 6, to \$5.00 per day within the State.

Doubtless the Legislature overlooked fixing the compensation for the members of the State Advisory Council. I would suggest that you give consideration to proposing an amendment at the next session, in order that this may be taken care of.

HOSPITAL CARE COMMISSION; AVAILABILITY OF STATE APPROPRIATIONS;
HOSPITALS

11 August 1947

In conference on Saturday the 9th of August you requested an opinion of this office as to whether or not a permit must be obtained from the Governor and Advisory Budget Commission under the provisions of Section 8 of the Budget Permanent Improvement Appropriation Bill of 1947 before making grants-in-aid to counties and cities for the construction of hospital facilities for counties, cities and towns of the State.

Section 8 provides, in effect, that the appropriations for permanent improvements contained in the Act for departments, institutions and agencies of the State shall not be available for expenditure until the Governor and the Advisory Budget Commission shall have determined the time best suited, in their opinion, for the State to secure the greatest benefit from the expenditure of these appropriations and shall have approved the date for starting the permanent improvement projects.

It is suggested by you that since these projects will affect county and city projects rather than those of departments, institutions and agencies of the State, such permit is not required. Your attention, however, is invited to the fact that the total appropriation for this purpose is made to "The Medical Care Commission" which is a State agency.

Your attention is invited to Section 10 of the Appropriations Act which provides that the appropriations made to the Medical Care Commission shall not be available for expenditure unless and until the Federal Government has appropriated and provided funds to cover at least one-third of the cost of construction.

It is the opinion of this office that in view of the language of the Appropriations Act pointed out above that a permit should be obtained from the Governor and the Advisory Budget Commission.

I discussed this matter with Mr. Deyton in conference this morning and he has suggested that you write him requesting a permit, and set out in the letter that Federal funds are available for the purposes of the Act and that arrangements have been made by the Commission to proceed with the construction of these hospital facilities. Mr. Deyton assured me that, should all arrangements have been completed by the Commission, the Governor and Advisory Budget Commission would act immediately to provide the permit contemplated by Section 8 of the Appropriations Act.

MUNICIPAL CORPORATIONS; COUNTIES; HOSPITALS; PUBLIC-BUILDING CONTRACTS; SEPARATE SPECIFICATIONS FOR BUILDING CONTRACTS;
PROCEDURE FOR LETTING OF PUBLIC CONTRACTS

7 January 1948

Your letter relates to a conference you had with Mr. R. G. Deyton, Assistant Director of the Budget, in which conference the question was raised as to the possible requirement of separate specifications for branches of work to be performed in the construction of a hospital. It is mentioned by you in your letter to this office that the Federal regulations pertaining to such contracts call for a single contract for building and for the various kinds of equipment. It is further stated by you, however, that it is feasible to satisfy the Federal requirement in the publicly-owned facility by obtaining separate bids in the respective branches and combining them so as to meet the Federal requirements.

You ask this office for a statement as to the laws of this State governing specifications when submitting bids upon contracts by counties, cities and towns. Your inquiry, of course, is especially concerned with the various types of local hospital authorities eligible for State and Federal aid.

So far as non-profit hospitals are concerned, I think we can safely say in the very beginning that they operate under separate charters granted by the Secretary of State; and although they may have certain immunities and advantages in the fields of taxation and grants-in-aid, etc., nevertheless, they are, for all legal purposes, private institutions or corporations, and this is certainly true when considering the scope of the statutes governing specifications, contracts and bids for construction of buildings, repair and purchase of equipment and other accessories.

As to publicly-owned facilities and hospitals operated by counties, cities and towns, although they may have separate boards or governing authorities, nevertheless, they are the creatures of the municipality; and they derive their powers and finances from municipal sources. They are agencies of counties, cities and towns. It seems to me, therefore, that the governing authority of any such hospital is bound by Section 160-280 of the General Statutes, which requires all officers, boards, departments and commissions to prepare separate specifications in awarding or entering into any contract for the construction or alteration of buildings when the entire cost of the work exceeds \$10,000. There must be separate specifications for (1) heating and ventilating and accessories; (2) plumbing and gas fitting and accessories; (3) electrical installations; and (4) air conditioning for the purpose of comfort cooling by the lowering of temperature, and accessories. These specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work above enumerated. The statute is then very careful to state the following:

"All contracts hereafter awarded by any county, or city, or a department, board, commission, or commissioner, or officer thereof, for the erection, construction or alteration of buildings or any part thereof, shall award respective work specified in the above subdivisions separately to responsible persons, firms or corporations regularly engaged in their respective line of work."

It would seem, therefore, that the above statute is primarily designed to prevent one overall contract on such a project wherein a primary contractor bids upon the whole construction, and every branch thereof, and then usually divides the contract into branches and gives the work to various subcontractors who are responsible to the primary contractor. It is the undoubted purpose of this statute to require separate branches to bid upon contracts by those contractors in that particular field, such as plumbing and heating in one field, and electrical installations in another field, to be bid upon by electrical contractors, etc.

I, therefore, do not see how we can avoid the application of this statute to hospitals owned and operated by counties, cities and towns, whether operated directly by the county or a separate governing authority appointed by the county, and likewise the same as to cities and towns. Section 160-280, however, has been amended by the addition of another paragraph which was done by the General Assembly of 1945. This additional paragraph reads as follows:

"Each separate contractor shall be directly liable to the county or city and to the other separate contractors for the full performance

of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor. For the purpose of this section, the wording, 'separate contractor' is hereby deemed and held to mean any person, firm or corporation who shall enter into a contract with any county or city for the erection, construction or alteration of any building or buildings."

I have quoted the above section or paragraph in full because your edition of the General Statutes which I left with Mr. Hamilton the other day does not contain the 1945 and 1947 amendments.

Your attention is also called to Section 143-129 which contains the procedure for the letting of public contracts, the public advertisement in the paper, the contents of the advertisement, how the proposal shall be opened and examined, and the furnishing of surety bonds by those to whom contracts have been awarded. Sections 160-280 and 143-129 are both in your edition of the General Statutes, and you can read these sections for your own information and for the details. Section 143-129 is applicable to both the State and to counties, cities and towns. You will note that Section 143-129 also regulates the bids upon purchase of apparatus, supplies, materials or equipment where the estimated expenditure of public funds is an amount equal to or more than \$1,000.00. However, your attention is especially called to Section 143-135 wherein you will note that "governmental agencies of subdivisions of the State of North Carolina" can have work done for such agency in an amount up to \$5,000.00 without being bound by Section 143-129. This exception apparently applies to work or services and does not apply to apparatus and equipment. There is also another exception that should be called to your attention, and that is, the General Assembly of 1945 passed an Act, which is Chapter 144 of the Session Laws of 1945, which permits the governing authorities of the State and of counties, cities and towns to enter into contracts with the United States of America or any agency of the Government for the acquisition of apparatus, materials or equipment without regard to and without being bound by the provisions of Section 143-129.

I have heretofore called your attention to the fact that you would be bound by Section 143-129 in the purchase of apparatus, supplies and materials for publicly-owned facilities or hospitals. In this connection, however, I might point out that where a specific piece of equipment is required, such as a certain type of x-ray machine or sterilizer, etc., it would be possible to frame your specifications in such language, without mentioning the brand or manufacturer's name, so that only those manufacturers or suppliers would have any interest in bidding on that particular type of equipment; and this would be so even if there were only one manufacturer or supplier. Where, however, there are various numbers of suppliers and manufacturers of standard equipment, such as beds, sheets, tables, etc., you will have to frame your specifications so that all manufacturers and suppliers of these standard supplies can offer competitive bids.

NORTH CAROLINA MEDICAL CARE COMMISSION; DOUBLE OFFICE HOLDING;
ARTICLE XIV, SECTION 7 OF CONSTITUTION; STATUS OF PUBLIC OFFICER
SERVING AT THE SAME TIME AS MEMBER OF GOVERNING BOARD OF PUBLICLY-OWNED AND OPERATED HOSPITAL; SERVING ON BOARD OF
NON-PROFIT HOSPITAL

28 January 1948

You state that the question has been raised as to the legality of a person who is already serving and holding a public office being appointed to and serving on the governing board or authority of a publicly-owned and operated hospital or a person who already holds a public office being appointed to and serving on the governing board or authority of a non-profit, non-stock, charitable hospital. This inquiry, of course, related to what is commonly called double office holding, which is prohibited by Article XIV, Section 7 of the North Carolina Constitution. If such a situation exists, the person who holds an office and accepts another such office in contravention of the Constitution, the result is that the first office is vacated upon qualification for the second office. While such a person has a right to elect which office he will retain, he is deemed to have elected to serve in the second office when he accepts and qualifies for such position. An office has been defined as a public position to which a portion of the sovereignty of the country or State, either legislative, executive or judicial, attaches for the time being and which is exercised for the benefit of the public; a public office is a parcel of the administration of government, civil or military, or is itself created directly by the law-making power. It is further provided by Section 128-2 of the General Statutes that any person who assumes to hold two offices contrary to the Constitution may be penalized and shall forfeit and pay \$200.00 to any person who will sue for the same. I would like to state before going any further, however, that Article XIV, Section 7 of the Constitution especially exempts from its application officers in the militia, notaries public and justices of the peace; and, therefore, these persons can hold more than one office and are not disqualified from holding another office by virtue of the fact that they are officers in the militia, notaries public and justices of the peace. So far as the work of the Medical Care Commission is concerned, I would like to consider the governing authorities of certain hospitals as follows:

(1) As to non-profit, non-stock, charitable hospitals, I do not think we have any question. While these institutions may engage in a great deal of public charity, nevertheless, their legal status is that of private institutions. For the most part, they operate under charters granted by the Secretary of State under the general corporation laws. They do not assume to exercise nor are they vested with any governmental functions or sovereignty of the State or any other unit of government. I think we can, therefore, definitely say that as to the board of trustees, board of governors, directors or any other form of governing authority of such hospitals, any public officer can serve on these boards or governing authorities without any question of double office holding being involved.

(2) I now deal with the governing body of hospitals organized under Article 12 of Chapter 131 of the General Statutes known as the Hospital Authorities Law. This statute provides for the creation of hospital authorities, and the statute expressly states that an "Authority" or "Hospital

Authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of the Hospital Authorities Law. Hospitals operating under these authorities consist usually of eighteen commissioners, and these commissioners are required to take an oath of office. The statute speaks of these commissioners as holding office and fixes what the statute calls their terms of office. The hospital authority created under this Article has extensive power, including the power of eminent domain; and I think it is clear that the members of the governing authority or the commissioners who operate a hospital under the Hospital Authorities Law are public officers, and any person who already holds a public office could not serve as such commissioner without vacating his first office. This would be particularly true, for example, of those persons who are serving on the governing authority or Board of the Charlotte Memorial Hospital which is operated under the Hospital Authorities Law; and I cite this as an example. In fact, I think that all persons who serve on the governing bodies of public hospitals created and organized under Chapter 131 of the General Statutes would be considered as public officers. The statute intends to create such positions as public offices and speaks of these positions as public offices. Powers of sovereignty such as the condemnation of land are given to persons holding such positions. This would also be true of hospitals established and organized under Article 2-A of Chapter 131 of the General Statutes known as the County Hospital Act.

(3) With reference to hospitals that are especially established and maintained under Article 13-B of Chapter 131 of the General Statutes, which is a portion of Chapter 933 of the Session Laws of 1947, we find that although such hospitals have the right of condemnation and the powers exercised are declared to be public and governmental, nevertheless, the board of managers or managing agent of such hospitals can be appointed by resolution of the governing body of the municipality which means the county commissioners in the case of counties and the board of aldermen or other governing body in the case of cities and towns. Section 131-126.21 is as follows:

"Any authority vested by this Article in the municipality for the planning, establishment, construction, maintenance or operation of hospital facilities may be vested by resolution of the governing body of the municipality in an officer or board or other municipal agency whose powers, duties, compensation, and tenure shall be prescribed in the resolution; provided, however, that the expense of such planning, establishment, construction, maintenance or operation shall be a responsibility of the municipality."

Under this broad power, we think it is possible for the governing authority of the county, city or town, in its resolution establishing a board of managers for the hospital or establishing the officer or any other board or agency that shall manage the hospital, can specifically state, in the resolution, that said public officers already holding office and serving can at the same time serve ex-officio on the board of managers or other governing authority of the hospital. If the resolution creating the board of managers or other board which shall have charge of and operate the publicly-owned hospital specifically states, for example, that the sheriff of the

county, chairman of the board of county commissioners or the superintendent of public welfare shall be ex-officio members of the body or group managing the hospital, then it seems to us that by putting such membership on an ex-officio basis, the prohibitions against double office holding would be avoided. The resolution, however, should be careful and specific on this point.

(4) I call your attention to the fact that there are many public-local acts creating various boards to manage publicly-owned and operated hospitals. The status of the members of these boards would have to be determined by the particular public-local act; and it may be that these public-local acts, in some instances, provide for ex-officio members on the governing authority of the hospital. In such cases, you would have to present to our office each specific case where a public-local act is involved. The positions I have discussed above in Paragraphs 1, 2 and 3 all deal with the general laws of the State.

TAXATION; MUNICIPAL CORPORATIONS; COUNTIES; NECESSARY EXPENSE;
HOSPITALS AS A NECESSARY EXPENSE

11 March 1948

You will recall that you have requested this office to comment upon the levying of taxes and the financing of hospitals by local units of government.

Article 13B of Chapter 131 of the General Statutes, which grants additional authority to subdivisions of government to finance hospital facilities, provides in general that counties, cities and towns may levy taxes for financing costs of constructions, etc., and for cost of operation and maintenance; but these tax levies are required to be approved by a vote of the people in the various municipalities. The tax levies and elections, issuance of bonds, etc., must follow the general financing plan which is governed by the Municipal Finance Act. The method in the 1947 Act is, of course, an additional authority; and, of course, the question has arisen as to whether, under other laws, counties could devote tax money to hospital construction, maintenance, etc., without the vote of the people or an election. The difficulty in this respect arises because of Section 7 of Article VII of the North Carolina Constitution, which reads as follows:

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The courts determine what class of expenses made or to be made by a municipality come within the definition of "necessary expense." The governing authorities of the municipality determine when such expenses are needed in a designated locality. There have been many judicial decisions of the Supreme Court of this State as to what is and is not a necessary expense. With reference to hospitals, the Supreme Court of North Carolina held, in the case of PALMER v. HAYWOOD COUNTY, 212 N. C. 284, that the building, maintenance and operation of public hospitals is

not a necessary expense. In this case, the Commissioners of Haywood County complied with the Municipal Finance Act for issuing bonds in the amount of \$30,000. No petition for an election was filed by any of the taxpayers, and the County Commissioners were about to issue the bonds when they were restrained in an action duly brought in the courts. The money was to be used for the building of an annex to a county hospital which was to be used principally for the care of the indigent sick.

The decision of the Court is supported by former decisions in this jurisdiction.

ARMSTRONG v. COMMISSIONERS, 185 N. C. 405 (Tubercular Hospital for Gaston County held not to be a necessary expense.)

NASH v. MONROE, 198 N. C. 306 (Maintenance of Municipal Hospital not a necessary governmental expense.)

BURLESON v. SPRUCE PINE, 200 N. C. 30 (Municipal Hospital for the Town of Spruce Pine held not to be a necessary expense.)

I quote from the case of PALMER v. HAYWOOD COUNTY, *supra*:

"This Court has repeatedly held that the building, maintenance, and operation of public hospitals is not a 'necessary expense.'

"In ARMSTRONG v. COMRS., 185 N. C., 405, 117 S. E., 388, speaking to the question of erecting a tubercular hospital for Gaston County, MR. JUSTICE HOKE said: 'Appellants insist further that a hospital of this character should be considered a necessary expense, and so comes directly within the purview and effect of the cases cited, but we cannot so hold.'

"In NASH v. MONROE, 108 N. C., 306, 151 S. E., 634, a 'residence lot and dwellings and buildings thereon' had been given to the city of Monroe for the 'purpose of providing a hospital for the sick and diseased and others requiring surgical or medical attention.' The city had contracted the operation of the hospital to a private physician. Then, in order to obtain certain benefits from the Duke Foundation, it was proposed that the management of the hospital should be changed, and that the city and county should buy the physician's equipment for operating the hospital. The city borrowed \$5,000 and gave its note for that purpose in anticipation of collection of taxes. Speaking to the question of validity of the note and the levy of the tax, MR. JUSTICE BROGDEN, for the Court, said: 'The maintenance of a municipal hospital is not a necessary governmental expense . . . Moreover, "for purposes other than necessary expenses a tax cannot be levied within or in excess of the constitutional limitation except by a vote of the people under special legislative authority." The city of Monroe . . . undertook to pledge the faith and credit of the city in order to obtain the money. This cannot be done except in accordance with methods provided by law.'

"In BURLESON v. SPRUCE PINE, 200 N. C., 30, 156 S. E., 241, plaintiff sought to enjoin a bond issue under the Municipal Finance Act for the purpose of 'constructing, maintaining, and operating a public hospital' in the town of Spruce Pine, after the question had been submitted to and approved by the qualified voters of the town, for the reason, among others, that said bonds are not for necessary expenses within the meaning of Art. VII, Sec. 7, of the Constitution."

It should be noted, however, that in the case of PALMER v. HAYWOOD COUNTY, *supra*, MR. JUSTICE CONNOR wrote a concurring opinion in which he stated that there may be a factual situation under which the construction or maintenance of a hospital for the care and treatment of the sick and indigent persons may be a necessary expense of a town, city or

county for which bonds, when authorized by an act of the General Assembly of the State, may be issued by the governing body of such town, city or county without the approval of a majority of the qualified voters therein. MR. JUSTICE CONNOR, in this concurring opinion, quoted from an opinion of the late JUSTICE BROGDEN, dealing with the question of necessary expense, in which this Justice said:

"The law is an expanding science, designed to march with the advancing battalions of life and progress, and to safeguard and interpret the changing needs of a commonwealth or community."

In this same case, PALMER v. HAYWOOD COUNTY, *supra*, MR. JUSTICE BARNHILL, who is still a member of the Court, wrote a dissenting opinion. In this dissenting opinion, among other things, MR. JUSTICE BARNHILL stated as follows:

"If it is a governmental function of the State to make provision for the poor and for the protection of the health of its citizenship, then the State has the power to delegate the performance of this duty to the respective counties. The Legislature has exercised this right of delegation and has vested the counties with authority to provide for the maintenance, comfort and well-being of the poor; C. S., 1297, subsection 28, and to establish public hospitals, C. S. 1297, subsection 29; C. S., 1334 (8); ch. 81, P. L. 1927. The defendants do not have to rely upon the provisions of C. S., ch. 119.

"If, then, the proposed expenditure is either a means by which the county seeks to provide for the comfort and well-being of the poor or to promote the health of its citizens, it is a necessary expense."

It will thus be seen that this Justice is of the opinion that such expenditures for hospital construction and maintenance are necessary expenses and that tax funds or funds derived from the sale of bonds could, therefore, be used for these purposes without a vote of the people.

It will thus be seen that the Supreme Court of North Carolina is not in entire agreement on the point, and there are many attorneys, as well as other persons, who feel that if the question were again presented to the Supreme Court of North Carolina, it is altogether possible that the Court would now hold that tax funds and funds derived from the sale of bonds could be used for such purposes without a vote of the people since it is thought that such requirements now fall within the category of necessary expenses. It is thought by these persons that a good case can now be made in view of the public interest in medical care and public health, in view of the poor record of North Carolina as shown by the rejections of men from North Carolina under the Selective Service Act in the last war and possibly many other factors.

MEDICAL CARE COMMISSION; PUBLIC CONTRACTS ACT; NON-PROFIT
ASSOCIATION; APPLICATION OF PUBLIC CONTRACTS ACT TO UNITS
RECEIVING GRANTS-IN-AID FROM MEDICAL CARE COMMISSION

30 June 1948

You state the facts in regard to your question as follows:

"In 1947 the Board of Trustees of the Roanoke-Chowan Hospital at Ahoskie, N. C. (a non-profit association) applied to the Medical Care

Commission for State and Federal aid to complete a 42-bed hospital which it was building. On December 26, 1947, the Commission agreed to provide \$139,652.90 to complete and equip the hospital which was then about 92% completed. However, before the application could be approved for State and Federal aid, it was found that it would be necessary to make a few minor changes in the construction to meet the building requirements of the U. S. Public Health Service and the Medical Care Commission. These changes involved work not covered by the existing contract.

"The Architect has now submitted to the Medical Care Commission for approval a proposal by the Contractor for approximately \$27,000.00 to cover the additional cost of the required construction changes, and for grading the grounds and construction of driveways, walks, etc. It is suggested by the Architect that this amount (\$27,000.00) be added as an 'extra' to the existing contract as a 'change order' (descriptive terms used in paragraph 23, page 26 of Budget Bureau Building Construction Manual.)"

On this state of facts, you inquire of this office as follows:

"Can a contract in force for a project aided by the Commission with State funds be modified to the extent of \$27,000.00 without calling for competitive bids?"

The so-called Public Contracts Act will be found as Article 8 of Chapter 143 of the General Statutes, beginning with Section 143-128. Section 143-129 deals with the procedure for the letting of public contracts and provides the method for competitive bids, which is the question which your Commission has in mind. This law applies to State boards and agencies of the State, counties, cities and towns or other subdivisions of government. The Roanoke-Chowan Hospital is governed by a board of trustees and operates as a non-profit association. It is not subject to the Public Contracts Law, and it can enter into its contracts in a private method or by private negotiation; and it can likewise use the competitive public bidding method if it desires to do so. The North Carolina Medical Care Commission is authorized, by Section 131-120, to make grants-in-aid and furnish financial assistance to hospitals owned by non-profit corporations or associations. Therefore, if such an association has validly entered into a contract to which the Public Contracts Law does not have any application, then that association can legally change the contract as described in your letter; and, in my opinion, this would not affect your right to make a grant or contribution to the non-profit association. The non-profit hospital or association is changing its contract in a legal manner when it does so without requiring public competitive bids. The contract, therefore, having been changed or altered in a legal manner, your Commission can make the grant-in-aid or contribution to such non-profit hospital or association.

Of course, your Commission can make it a requirement or condition that such a non-profit corporation or association shall handle its contracts on a competitive-bid basis before you make any grant-in-aid or contribution to such an organization. I say this because your Commission is authorized to make grants-in-aid for hospital purposes "as shall be determined in each case by the North Carolina Medical Care Commission in accordance with the standards, rules and regulations as determined, adopted and promul-

gated by the North Carolina Medical Care Commission." I am informed, however, that you have not adopted such a regulation or made it a condition for furnishing funds or grants-in-aid to non-profit hospitals and associations. I advise, therefore, that you can make this grant without calling for competitive bids and that you can do so for non-profit associations and hospitals until your Commission establishes a regulation requiring competitive bids in all cases whether non-profit, county, city or whatever unit involved.

OPINIONS TO STATE BOARD OF MEDICAL EXAMINERS

STATE BOARD OF MEDICAL EXAMINERS; PLACE WHERE
MEETINGS ARE TO BE HELD

20 August 1946

In your letter of the 19th of August, 1946, you inquire if there is any authority for the State Board of Medical Examiners to hold examinations in a city other than Raleigh.

Chapter 90, Section 5, General Statutes of North Carolina is as follows:

"The Board of Medical Examiners may assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable."

It seems clear from the wording of the statute above quoted that the State Board of Medical Examiners may hold examinations in the Bowman Gray School of Medicine, at Winston-Salem, North Carolina, or at any other place in the State as in their discretion they may deem advisable.

BOARD OF MEDICAL EXAMINERS; FEE FOR EXAMINATION; RETENTION
OF 10% UPON FAILURE OF APPLICANT

22 January 1947

I have your letter of January 20, in which you write me as follows:

"At a recent meeting of the Board of Medical Examiners it resolved to change our financial arrangement in that where an applicant is declined licensure or fails to appear that 10% of the fee of \$50.00 be retained for the clerical handling.

"Please advise us if this resolution is in order."

The statute on this subject is G. S. 90-15, which authorizes the collection of a fee of \$15.00 for applicants for license, except the license authorized by G. S. 90-13; that is, a license without an examination, when the treasurer is authorized to collect a fee of \$50.00. Nothing is said in the Act about refunding the licenses paid by an unsuccessful applicant.

In view of your letter stating that you are collecting a fee of \$50.00, which I assume is in all cases, I would suggest that the terms of this statute should be examined to determine whether or not the board is authorized to collect this fee, except in case of license without an examination as authorized by the statute.

PHYSICIANS; REVOCATION OF LICENSE BY COURT; DUTY OF STATE BOARD OF MEDICAL EXAMINERS TO REVOKE LICENSE UPON CONVICTION OF FELONY

29 January 1947

I received your letter of January 28, enclosing a clipping with an account of the sentence imposed by Judge Felix Alley, in Rockingham Superior Court, on Dr. Ora Fisher Logan, including an order that she surrender her license to practice medicine in North Carolina.

You request me to advise you whether the Board of Medical Examiners has any duty in this matter, and you inquire as follows:

"We will thank you to advise the Board of Medical Examiners if it, the board, has any duty in this matter. If the said physician surrenders her license, should we accept it and mark it revoked or should we have a regular hearing in the matter? Can the court order the license revoked or is that a prerogative of the board granting it?"

G. S. 90-1 provides that the board has power to revoke and rescind a license to practice medicine when a person has been convicted in any court, State or Federal, of any felony or other criminal offense involving moral turpitude. The statute further provides that upon a hearing before said board of any charge involving a conviction of such felony or other criminal offense, the transcript of the record thereof, certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license.

I believe that it is incumbent upon the board to secure a certified copy of the judgment of the court in this case and notify Dr. Logan of the time and place for a hearing, to show cause why her license should not be revoked by the State Board.

In answer to your third question, I do not know of any statutory authority for the Judge of the Superior Court to revoke a license granted by the Board of Medical Examiners to a physician. It may be that the newspaper story about this part of the action of the Court is inaccurate. The presiding Judge would have the authority, upon a conviction, to suspend the judgment upon the condition that the defendant shall not thereafter engage in the practice of medicine, upon a violation of which the sentence of the Court could be imposed, but this is the only authority I know of that the Court could have in such a matter. I believe it is the duty and prerogative of your board to revoke the license under the provisions of the statute which I have cited.

NAMES; LEGAL NAME OF MARRIED WOMAN

28 April 1947

In your letter of the 22nd of April, 1947, you state that you have an applicant for a license by the name of Marguerite Lazenby Williams who has requested permission to take Part II of the written examination of the Board of Medical Examiners, stating that she has already taken Part I of the examination under her maiden name of Marguerite Lazenby and that in such name she has been given credit for passing Part I of the written examination. You inquire if this applicant will be required to take Part II of the examination under the name of Lazenby in order to receive credit for Part I.

I do not think so. If this applicant can furnish satisfactory evidence to you that Marguerite Lazenby and Marguerite Lazenby Williams are one and the same person, she should be permitted to take the examination in her married name and receive credit for having taken and passed Part I of the examination.

STATE BOARD OF MEDICAL EXAMINERS; PER DIEM AND EXPENSES FOR
MEMBERS AND OFFICERS

12 August 1947

Replying to your letter of the 8th of August, 1947, you are advised that this office is in accord with your understanding of G. S. 90-15 relating to salaries, fees and expenses of the State Board of Medical Examiners and its officers in that:

The above section provides, in part, that "The compensation and expenses of the members and officers of said board, and all expenses proper and necessary in the opinion of said board, to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of such funds, upon the warrant of the president and secretary of said board. The salaries and fees of the officers and members of the said board shall be fixed by the board, but shall not exceed ten dollars (\$10) per day per member, and railroad fare and hotel expenses; and no expense shall be created to exceed the income from fees herein provided. Any unexpended sum or sums of money remaining in the treasury of the said board at the expiration of the terms of office of the members thereof, shall be paid over to their successors after their election and qualification as such."

Under the above quoted section of the law, the Board has authority to fix the compensation of its members and officers and to pay all their proper expenses necessarily incurred in discharging their duties not to exceed ten dollars (\$10) per day and not to exceed the total income derived by the Board from license fees prescribed in the first part of the section.

In my opinion the section is broad enough to include all expenses of whatever nature incurred by members of the Board and its officers or employees, including railroad fare, automobile mileage, hotel expenses, office rent, secretarial salary, and any and all other expenses which might be incurred by any member of the Board or any of its officers in the performance of their official duties and in connection with official business of the Board.

In view of the language of the last sentence of the section quoted above, it is my opinion that there is authority to pay officers and members of the Board for time and travel upon attending any meeting, or the performance of any duty at any time prior to the expiration of the term of office of any member of the Board or any of its officers. In other words, if any Board member has not been paid his per diem and expenses for attendance upon his duties from the beginning of his term of office up to the date of the expiration thereof, such member or officer might be paid for such expenses at any time prior to the expiration of such term of office by the Treasurer of the Board upon the warrant of the President and Secretary as provided in the Act.

OPINIONS TO RURAL ELECTRIFICATION AUTHORITY

RURAL ELECTRIFICATION AUTHORITY; ELECTRIC MEMBERSHIP CORPORATIONS;
NECESSITY FOR OBTAINING PERMISSION TO SERVE
OUT-OF-STATE COMMUNITIES

2 October 1946

I have your letter of October 1, in which you state as follows:

"Is it necessary for Electric Membership Corporations to obtain permission from the North Carolina Rural Electrification Authority in order to serve communities located in adjacent states?"

"Does the North Carolina Rural Electrification Authority have the right to grant permission to an Electric Membership Corporation to render service in an adjacent state or states?"

After my letter to Honorable Dudley Bagley dated November 16, 1938, in which I expressed the opinion that an Electric Membership Corporation created under Article 2 of Chapter 117 of the General Statutes was not authorized to extend, construct, operate and maintain power lines in adjacent states, our law was amended by Chapter 335 of the Public Laws of 1941 by adding to G. S. 117-18, subsection (m), which adds to the powers of an Electric Membership Corporation the right to extend, construct, operate and maintain power lines into adjacent states.

The powers of the Rural Electrification Authority are set forth in G. S. 117-2 and I am of the opinion that its authority would be co-extensive with the powers granted to Electric Membership Corporations, to the extent of granting to them the permission to render service in this State and in adjacent states.

G. S. 117-26 provides that whenever any corporation organized under that article desires to secure a grant or loan from any agency of the United States Government, they shall apply through the North Carolina Rural Electrification Authority and not direct to the United States agency, and the North Carolina Rural Electrification Authority alone shall have the authority to make application for grants or loans to any corporation created under that article.

In a telephone conversation with Honorable Gwyn B. Price, Chairman of the Rural Electrification Authority, on yesterday, he requested my opinion as to whether or not the Rural Electrification Authority would have the authority under our law to make application for grants or loans under this section, for the construction of lines outside of this State.

In my opinion the Rural Electrification Authority would have such authority and this section would be applicable to it in making application under these circumstances.

ELECTRIC MEMBERSHIP CORPORATIONS; RIGHT TO CONDEMN PROPERTY

8 May 1947

I received a copy of your letter of May 7, 1947, enclosing a letter to you dated April 30, 1947, from Mr. Hunter Martin in which he advances the

position that the Blue Ridge Electric Membership Corporation was without authority to institute condemnation proceedings to condemn rights of way for a high voltage transmission line in Caldwell and Watauga Counties. He refers to the provisions of G. S. 117-18(f) and G. S. 117-2(g) and concludes that it was necessary for the corporation to secure the approval of the North Carolina Rural Electrification Authority before condemning land for these purposes, and that it would also have to be brought in the name of the North Carolina Rural Electrification Authority.

G. S. 117-2(g), defining the powers of the North Carolina Rural Electrification Authority, provides:

"(g) To have the power of eminent domain for the purpose of condemning rights of way for the erection of transmission and distribution lines either in its own name or its own name on behalf of the electric membership corporations to be formed as provided by law."

G. S. 117-18(f), defining the powers of electric membership corporations, provides, in part, as follows:

"In all questions involving the right of way or the right of eminent domain, the rulings of the North Carolina Electrification Authority shall be final."

Chapter 56 of the General Statutes, entitled "Electric telegraph and power companies," makes provision for the acquisition by condemnation of rights of way for telegraph, telephone and electric power or lighting companies. G. S. 56-5 confers this authority generally upon such companies in a very comprehensive way.

Chapter 40 of the General Statutes, entitled "Eminent domain," in G. S. 40-2, includes electric power or lighting companies among those who may acquire property by condemnation for purposes necessary for their operation.

G. S. 117-18, in specifying the powers to be exercised by electric membership corporations, says that "subject only to the Constitution of the State, a corporation created under the provisions of this article shall have the power to do any and all acts or things necessary or convenient for carrying out the purpose for which it was formed, *including but not limited to*" the powers enumerated, including the one quoted in subsection (g).

I am not informed as to under what authority the Blue Ridge Electric Membership Corporation attempted to exercise the powers of condemnation referred to in the letter from Mr. Martin. I am, however, after careful consideration, unable to say it did not have authority to acquire by condemnation, in its own name, property necessary for its operation, either under Chapter 56 of the General Statutes or Chapter 40 of the General Statutes. I am left in some doubt as to what is the meaning of the language found in subsection (f) of G. S. 117-18, or what the practical application of this provision would be in condemnation proceedings.

As the matter is now pending in court, these questions will undoubtedly be solved by some judicial determination, with which we, of course, do not attempt to interfere.

OPINIONS TO RECREATION COMMISSION

DOUBLE OFFICE HOLDING; MEMBERSHIP OF PARKS AND RECREATION COMMISSION

6 March 1948

I have your letter of March 5, 1948, following our conversation over the phone, and I enclose copy of an opinion letter written to Honorable Henry B. Edwards, member of the Shelby Parks and Recreation Commission, covering the question of double office holding which your letter raises.

I doubt if I can add anything to the opinion expressed in paragraphs 2, 3, and 4 of the letter to Mr. Edwards. Paragraph 2 points out powers conferred upon the commission under G. S. 160-158 are of such a nature as to make membership on the commission a public office, and I see no reason to reach any other conclusion now than that expressed in the fourth paragraph of our letter of December 4, 1947, to the effect that one person may not legally serve as a member of a recreation commission and as a public official on a municipal governing board.

OPINIONS TO DIVISION OF PURCHASE AND CONTRACT

PRICE CONTROL ACT; APPLICABLE TO SALES BY STATE

8 August 1946

I received your letter of August 5, in which you write as follows:

"On July 22nd, this Department advertised a surplus truck belonging to the State of North Carolina for sale. At that time the OPA was dead. These bids were opened on August 1st, at which time the OPA had been revived by Congress. We have an offer on this vehicle for \$150.00 above ceiling price, which was made on July 31st. This Division desires a ruling from your Department stating whether or not it would be legal to accept this bid above ceiling price.

"The various State Departments are declaring a considerable amount of old equipment surplus at this time, and requesting this Division to sell same. This Division would also like to have a ruling stating whether or not we might sell this surplus material in the future without regard to OPA ceiling prices."

In *CASE v. CHESTER BOWLES*, 90 Sup. Ct. 398, decided February 4, 1946, it was held that where the validity of a Maximum Price Regulation of the Office of Price Administration, as applied to a sale of property by a state, is challenged on the ground that it is not within the power of Congress to enact a statute conferring regulatory power over transactions by states, the Supreme Court of the United States will, in order to reach the constitutional question, decide whether the Emergency Price Control Act may be interpreted as applicable to sales by states, notwithstanding the grant to the Emergency Court of Appeals of exclusive initial jurisdiction to determine the statutory authority of the Price Administrator to promulgate a regulation.

This decision was under the Emergency Price Control Act which expired. I have examined the Price Control Extension Act of 1946 and find that there is no provision in it exempting sales by a state of its property. Therefore, under the decision of the Supreme Court of the United States, sales of State property would be subject to the Price Control Extension Act of 1946, and rules and regulations adopted by the Price Administrator in connection therewith.

NORTH CAROLINA SYMPHONY SOCIETY; AUTHORITY FOR PURCHASE OF
SUPPLIES UNDER STATE CONTRACT; DIVISION OF
PURCHASE AND CONTRACT

28 October 1947

In your letter of the 27th of October, 1947, you inquire if your Division has any authority to make purchases for and on behalf of the North Carolina Symphony Society.

Prior to 1943 this Society was a non-stock, non-profit organization which was organized by a number of patriotic North Carolinians who were interested in making fine music available to the people of the State and promoting interest and appreciation therein. In 1943, by enacting Chapter 755 of the Session Laws of that year, the General Assembly placed this Society under the patronage and control of the State and authorized the Governor and Council of State to allot funds from the Contingency and Emergency Fund to aid in the carrying on of the activities of the said Society. The Act provided for an audit of the accounts of the Society annually by the State and also directed that all expenditures made by the Society would be subject to the Executive Budget Act of the State.

In view of the language of the statute referred to above, to the effect that this Society is under the patronage and control of the State, that its plans and purposes are distinctly educational, that annual appropriations are made for its support from State funds, and that all expenditures made by said Society are subject to the Executive Budget Act, it is thought that you have authority to make purchases for and on behalf of this organization.

GASOLINE TAX; EXEMPTIONS; ACTIVITY BUS OF CHARLOTTE
TECHNICAL HIGH SCHOOL

26 March 1948

I have your letter of March 24, 1948, enclosing letters from Messrs. C. C. Brown and C. I. Hambright and requesting my opinion on the problems presented therein. Mr. Hambright inquires if he is entitled to buy gasoline without paying the 6c per gallon tax when such gasoline is to be used in a bus used in connection with athletics at Charlotte Technical High School. This is not a county school vehicle.

I am of the opinion that gasoline to be used in the bus mentioned above is not exempt from the 6c per gallon tax. The only exemption from the 6c per gallon gasoline tax is for gasoline purchased by county boards of education for use in public school transportation vehicles, service trucks, and gasoline delivery wagons used only for school purposes. This exemption does not extend to gasoline to be used in the bus about which Mr. Hambright inquires.

OPINIONS TO WILDLIFE RESOURCES COMMISSION

WILDLIFE RESOURCES COMMISSION; REGULATIONS AS TO FISH, FISHING AND FISHERIES; CRIMINAL PENALTY FOR FISHING IN CLOSED SEASON

11 December 1947

Your inquiry to this office is as follows:

"Does a Justice of the Peace have authority to dispose of a case in which the defendants are charged with *fishing in the closed season*?"

I assume that your words "to dispose of a case" mean the authority of a justice of the peace to enter a final judgment inflicting a criminal penalty for the violation of a statute or its regulations relating to fishing in the closed season. The authority of the Wildlife Resources Commission to make rules and regulations relating to fish, fishing and fisheries is found in Section 113-136 of the General Statutes, Cumulative Supplement of 1945. For the same law, see also Chapter 776 of the Session Laws of 1945. Under this statute, the Commission is authorized: "to regulate the seasons at which the various species of fish may be taken in the several waters of the State. . . ." The statute further provides as follows: "and any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the Court."

The statute above referred to has been passed upon by the Supreme Court of North Carolina in the case of *STATE v. DUDLEY*, 182 N. C. 822. The Supreme Court, in this case, held that this was a valid statute and that the Commission had the authority to make rules and regulations regulating the seasons at which the various species of fish may be taken from the waters of the State and that a violation of the rules and regulations of the Commission constituted a misdemeanor.

The Court further held that the regulatory power thus conferred upon the Commission was not a delegation of legislative authority and that this statute was constitutional and valid. The Wildlife Resources Commission was organized under Chapter 263 of the Session Laws of 1947, but this Act relates to an administrative transfer of authority; and Section 18 of this Act specifically left in force all laws and clauses of laws theretofore existing on the subject we now have under consideration.

The jurisdiction of a justice of the peace in criminal matters is fixed by Section 7-129 of the General Statutes. In criminal matters, a justice of the peace only has final jurisdiction of those criminal offenses wherein the punishment prescribed by law does not exceed a fine of fifty dollars (\$50.00) or imprisonment for thirty days. The punishment prescribed in Section 113-136 is that of a misdemeanor, and the Court is authorized to fine or imprison the offender in its discretion. You will notice that no precise limit of time or limit of fine is fixed by the statute. Under Section 14-3 of the General Statutes, all misdemeanors, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law.

There are some exceptions for more severe penalties where the misdemeanor is committed in secrecy and with malice or involves the element of fraud.

In passing on this question, therefore, as to how much punishment can be given where a statute fixes the crime as being a misdemeanor and allows the punishment to be in the discretion of the Court, the Supreme Court of North Carolina has said that punishment as high as two years in prison is valid; and some very high fines have also been sustained. Just what the limitation would be as to fines, we do not know as it has not been expressly decided. We do know that a person can be imprisoned under such a statute for two years, and it has been intimated that perhaps in some particular cases, a punishment of imprisonment for more than two years would be sustained.

I am of the opinion, therefore, that since the violation of a regulation of the Commission for fishing in a closed season is a misdemeanor, punishable by a fine or imprisonment in the discretion of the Court, a justice of the peace has no final jurisdiction to hear and dispose of such a case; and the only authority the justice of the peace would have would be to hear the matter upon preliminary investigation and to find either that there was no probable cause and dismiss the case or to find that there was probable cause and to require the defendant to furnish bond for trial in the higher Court. In all of our legal experience, we have never before heard the contention that a justice of the peace had any final jurisdiction of a misdemeanor punishable in the discretion of the Court.

GAME LAWS; CURRITUCK COUNTY GAME COMMISSION; CONTRIBUTIONS TO

10 March 1948

I acknowledge receipt of your letter of February 26 with enclosures from Mr. H. E. Forbes of the Currituck County Game Commission and Honorable R. G. Deyton, Assistant Director of the Budget.

In your letter you state that the question has arisen as to the authority of the North Carolina Wildlife Resources Commission to make a contribution to the Currituck County Game Commission to compensate its members and to provide certain expenses of the Commission in the performance of its duties.

The Currituck County Game Commission was established by Chapter 160 of the Session Laws of 1935 and this statute imposes certain duties and responsibilities upon the Commission, which I understand relieves the North Carolina Wildlife Commission of certain details in the enforcement of the game law in Currituck County and that it is highly desirable that co-operative relationship be continued between the two Commissions.

I find no direct authority for your Commission to make a contribution of the type mentioned in your letter nor do I find any statute which would prohibit such contribution. I understand that it was the administrative practice of the Game Division of the Department of Conservation and Development for a long period of years to make contributions to the Currituck Commission on the theory that it relieved the Wildlife Division of many of the details in the enforcement of the game laws in that county.

Our courts would not be bound by a policy established by an administrative agency, but when there is doubt the court does give considerable weight to what has been the administrative practice. See the case of *VALENTINE v. GILL*, Commissioner of Revenue, 223 N. C. 396.

As I have pointed out above, I find no direct statutory authority for making the contributions, but I am inclined to the opinion that your Commission may, if it so desires, make such contribution in view of the long administrative practice, if you find that the Currituck County Game Commission is rendering valuable services to your Commission and relieving it of many of the details in the enforcement of the game laws, and particularly so, if your Commission should find that certain expenses would be incurred by the Board in the performance of duties which are now performed by the Currituck County Commission.

HUNTING AND FISHING LICENSES IN SWAIN COUNTY; RESIDENCE

28 April 1948

I have your letter of April 27, in which you inquire about the so-called "Jones Law." I assume that this refers to Chapter 52 of the Public-Local Laws of 1935, which provides as follows:

"Section 1. That the citizens and residents of Swain County are hereby allowed to take fish from the following streams in said county with hook and line, trot line, or basket, without procuring a license therefor, to wit: Tuckaseegee River, Tennessee River, Nantahala River, Alarka Creek, and Occona Lufta River up to the line of the Great Smoky Mountain National Park, and the fish taken from the park area in this river shall be governed by the rules and regulations now in effect by the officials of the said Great Smoky Mountain National Park.

"Section 2. That the provisions of this Act shall be construed to mean all persons domiciled and actually living in Swain County."

OPINIONS TO VETERANS COMMISSION

VETERANS; CHILDREN OF; EDUCATIONAL ADVANTAGES FOR CHILDREN;
CHILDREN OF MOTHERS IN THE ARMED SERVICES

6 June 1947

In your inquiry of June 6th you request an interpretation of General Statutes 116-148 in its relation to General Statutes 116-145-6-7.

General Statutes 116-145-6-7 provides certain educational advantages for a limited number of children of certain specified World War veterans, and while the language of these three sections refers specifically and exclusively to veterans who are *fathers*, General Statutes 116-148 definitely extends the scope of 116-145-6-7 by providing that "all of the benefits of the provisions of 116-145-6-7 shall be extended to and made available for the children of *veterans* of the armed forces . . . who serve" during the specified period. (Chapter 840 of the Session Laws of 1945 amended General Statutes 116-148 so as to make it apply to 116-146 and 116-147 as well as 116-145.)

The original language of General Statutes 116-145-6-7 was "father"; General Statutes 116-148 broadened this to "veterans"; "veterans" clearly includes mothers as well as fathers; and in our opinion, this was clearly the intent of the Legislature. There would have been no point in broadening the language in General Statutes 116-148 had there been no intention of broadening the application of General Statutes 116-145-6-7. Consequently, I am of the opinion that the educational advantages provided in these sections is available to children of mothers as well as fathers falling within the specified classes of veterans.

WILLS; VETERANS; MINORS

20 October 1947

I received your letter of October 15 with reference to the execution of a will by a veteran who at the time the will was executed was in service and eighteen years of age.

We have no law in this State which authorizes a minor veteran or person in service to execute a valid will. G. S. 31-1 provides that no person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years. No Act was passed by the General Assembly to make this inapplicable to servicemen or to veterans.

OPINIONS TO STATE BOARD OF ACCOUNTANCY

LICENSING BOARDS; BOARD OF ACCOUNTANCY; WAR VETERANS; EXEMPTION FROM PAYMENT OF LICENSE FEES WHILE IN MILITARY SERVICE

23 July 1946

In your letter of the 18th of July, 1946, you inquire if the State Accountancy Board has the right to waive renewal license fees for Certified Public Accountants. You specifically inquire if Certified Public Accountants who were in military service during the recent war are exempt from the payment of license fees to your board during the period in which they were in the armed forces of the United States.

Attention is invited to Chapter 105, Section 249.1 (b), General Statutes of North Carolina, where it will be found that any person entering into the armed forces of the United States or in the merchant marine shall be during the period of such service exempt from paying any license fees to any licensing board or commission or to the State of North Carolina in which the payment of such license fees is by law required as a condition to the continuance of the privilege to engage in any trade or profession. This act further provides that such a person upon being discharged from such service shall have all the rights and privileges to engage in such profession upon payment of such fees as may thereafter become due, to the same extent as though such activity had not been suspended during the period of such service.

Under the language of this statute it will be seen that veterans of World War II are exempt from the payment of the license fees for the issuance of a certificate from your board only during the period in which they were actually in the armed forces of the United States. The exemption from the payment of such fees does not extend beyond the date of discharge of such person from the armed forces of the United States, and he may be required to pay such fees, as may be fixed by law, before engaging in the practice of his profession after such discharge.

PUBLIC ACCOUNTANT; USE OF THE TITLE "ACCOUNTANTS"

9 September 1946

In your letter of the 6th of September, 1946, you inquire if there is any law which prohibits a person listing himself in the telephone book as an "accountant."

Section 3 of Chapter 93, of the General Statutes of this State, provides it shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same

has been admitted to practice as a certified public accountant. Section 8 of this Chapter prohibits the use of the title "public accountant" without qualification as such public accountant as provided in this Chapter.

It is not thought that the Legislature has gone so far as to prohibit a person using the title "accountant" after his name without having first qualified as a certified public accountant or a public accountant as defined in the Act.

OPINIONS TO BOARD OF PHARMACY

N. C. BOARD OF PHARMACY REQUIREMENTS TO BECOME LICENSED AS A PHARMACIST; SECTION 90-61 OF THE GENERAL STATUTES; AMOUNT OF TIME OF ATTENDANCE AT A REPUTABLE SCHOOL OR COLLEGE OF PHARMACY TO BE CREDITED IN LIEU OF EXPERIENCE; CREDIT FOR LIBERAL ARTS SUBJECTS AFTER TRANSFER TO SCHOOL OF PHARMACY

14 July 1947

In your letter you call attention to Section 90-61 of the General Statutes of North Carolina which gives the requirements which all applicants for license must meet in order to be licensed as a pharmacist in this State. In order to set out the question I quote a portion of Section 90-61 as follows:

"In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the board of pharmacy satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination of the board of pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required."

In order to state the circumstances under which your inquiry arises I shall quote from your letter as it contains a better statement than I could devise myself. On this phase of the matter you state as follows:

"From the records available in the office of the Board of Pharmacy it appears that the experience requirement has been construed rather strictly in that only time actually spent in a school of pharmacy was allowed to satisfy the experience requirement of the law.

"The curricular requirements which must be met in order to be graduated from a reputable school or college of pharmacy contains approximately 205 credit hours. About one-fourth or 50 of these hours are credited for work done in liberal subjects taught under identical conditions and by the same faculty teaching students registered in the general college. These 50 hours are distributed throughout the four school years covered by the curriculum.

"It is the practice of the School of Pharmacy to admit some students who have previously attended Liberal Arts Colleges and later transferred to the School of Pharmacy where they are allowed credit toward a degree in pharmacy to the extent that the work done in the Liberal Arts Colleges would satisfy the curricular requirements of the School of Pharmacy not to exceed one year's work. It has been requested that the Board of Pharmacy allow experience credit for this year spent in attendance at a non-pharmacy college toward the requirement of the four years' experience set forth in Section 90-61. It would appear that this is a reasonable request in that the subject material covered in the 50 hours is the same at any of the Liberal colleges as that taught in the School of Pharmacy. There is, however, one objection to allowing credit toward the experience requirement under such arrangement. Under the pharmacy curriculum the liberal work is distributed through-

out the four years, which means that during the four years a student is always taking pharmacy courses where he is exposed to the pharmaceutical atmosphere of the School of Pharmacy and absorbs something of value which is of an intangible nature. This would be missed in a general college. It can further be stated that many of the students who receive all of their liberal work concentrated in the first year most likely did not decide on pharmacy as a career until the time they had changed their course of instruction and, therefore, had not become orientated in their approach to pharmacy as well as those students who had set out from the beginning to study pharmacy.

"From conversations with former members of the Board of Pharmacy it was learned that the four years' experience requirement from which time spent in a college of pharmacy might be deducted was deliberate rather than stating graduation from a reputable college of pharmacy plus one year of practical experience and was so stated for the reason outlined above."

Your inquiry in substance, therefore, is whether the time spent in liberal subjects taught under identical conditions and by the same faculty teaching students registered in the general college can be credited as time spent in the School or College of Pharmacy for the purpose of experience credit or for the purpose of deduction from the time of experience required under Section 90-61. To put the question in another way, it is the practice of the school of Pharmacy, as you state, to admit some students who have previously attended Liberal Arts Colleges, and who later transferred to the School of Pharmacy, and to give them credit in their pharmacy courses towards a degree in pharmacy to the extent that the work done in Liberal Arts Colleges would satisfy the curricular requirements of the School of Pharmacy not to exceed one year's work. Should this one year spent in a non-pharmacy college, but which is recognized and credited in pharmacy courses, be allowed for experience credit?

While I appreciate the argument that the statute uses the words "actual time of attendance at a reputable school or college of pharmacy," and I also appreciate the argument that it would perhaps be better for a pharmacy student to have his liberal arts work distributed throughout the four years during which he is at the same time pursuing subjects in the regular pharmacy curriculum, but I don't think that this intention was incorporated in the words used in the statute. In order to carry out such an intention, in my opinion, the statute would have been required to expressly state that the actual time of attendance at a reputable school or college of pharmacy was not only required, but in addition to this actual time of attendance, he must have been registered as a student in pharmacy pursuing the regular pharmacy curriculum, and as a regular pharmacy student. Had such language been used this would have required him to have been registered as a regular pharmacy student in a College of Pharmacy when he pursued or studied the liberal courses, or the regular liberal arts work. The trouble with the argument stated in the next to the last paragraph of your letter is that you do allow students, who have previously attended Liberal Arts Colleges, to transfer to the School of Pharmacy, and you do allow them credit toward a degree in pharmacy for the work done in the Liberal Arts Colleges which satisfied the curricular requirements of the School of Pharmacy not to exceed one year's work. When you do this, and when you allow such credit, you thereby incorporate the liberal arts work into and make it a part of the work of the School of Pharmacy, and the subjects pursued

in the Liberal Arts Colleges are deemed by you to be, and you make such subjects the equivalent of the same type of work pursued in the regular School of Pharmacy. To allow credit for these liberal arts subjects in the School of pharmacy toward a degree, and also to say that these same subjects for which credit is allowed, are the same subjects that would be pursued had the student originally registered as a pharmacy student, and not credit this after graduation towards experience, would be sacrificing the substance for the shadow. I cannot follow this line of reasoning unless the statute had expressly said that the subject must be pursued while registered as a regular pharmacy student in the School of Pharmacy.

I am of the opinion, therefore, that such applicants should have credit for this time, or for this year spent in attendance at a non-pharmacy college and pursuing subjects which you recognize and give credit for towards a pharmacy degree, and that it must be considered the entire time spent, or actual time of attendance at a reputable school or college of pharmacy, and is, therefore, a proper item to be deducted from the time of experience required.

NORTH CAROLINA BOARD OF PHARMACY; LICENSING; MINIMUM STANDARDS
AS TO PRACTICAL EXPERIENCE APPROVED BY THE N.A.B.P.; AUTHORITY
OF NORTH CAROLINA BOARD OF PHARMACY TO ADOPT APPROVED
MINIMUM STANDARDS FOR COMITY PURPOSES

23 July 1947

I have before me the Minimum Standards for the Enforcement of Practical Experience Requirements as amended and approved by the N.A.B.P. in 1940. It is my understanding that the various examination authorities or those authorities granting licenses to pharmacists in the various states have been asked to approve these Minimum Standards to the end that those persons who are licensed to practice pharmacy in our State may be granted licenses by reciprocity in other states. Likewise, you would license pharmacists from other states coming into this State where these Minimum Standards are met by the applicants. You have asked this office to review these Minimum Standards and to express an opinion as to whether the North Carolina Board of Pharmacy has the authority to adopt such standards. I will review the Standards according to the number of the paragraphs as shown on the paper I have before me.

Standard No. 1 defines the term "year" as fixing the quantitative standard for practical experience. It means fifty-two weeks of not less than forty-eight hours of service per week under the supervision of a registered pharmacist. Under the provisions of Section 90-61 of the General Statutes, the applicant must present to the Board of Pharmacy "satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist." The word "year" in the statute is not defined, but I think you would have the legal right to define the word under the authority granted your Board to adopt rules and regulations, which is contained in Section 90-57 of the General Statutes; and also you would have the right to require this as a method of producing satisfactory evidence of the experience. I am of the opinion, therefore, that you can adopt Standard No. 1.

Standard No. 2 states that not more than six months of credit per year will be given for practical experience in a hospital pharmacy, and not more than six months' credit per year will be given for such experience obtained in a pharmacy compounding less than one thousand prescriptions annually or devoting less than fifty per cent (50%) of its activity to the sale of drugs and medicines and supplying pharmaceutical service. I do not think that you can adopt this Standard. It seems to me that this Standard goes too far and annexes or imposes conditions much more stringent than those required in Section 90-61 of our statute. Our statute requires four years' experience in a pharmacy under the instruction of a licensed pharmacist. It does not exclude a hospital pharmacy, and it does not exclude experience obtained under a licensed pharmacist in a drug store compounding less than one thousand prescriptions annually or devoting less than fifty per cent (50%) of its activity to the sale of drugs and medicines, etc. I do not think the Board could adopt Standard No. 2 under guise of establishing satisfactory evidence of experience. It is true the evidence must be satisfactory, but this does not mean that the Board can set any standard that it chooses. The Board cannot act arbitrarily or capriciously in exercising its discretion as to what it will or will not consider satisfactory evidence. I, therefore, cannot recommend that you have the authority to adopt Standard No. 2. I do not see, however, how this will be much of a problem in our State as you have extremely few pharmacists which fall within the exclusions of Standard No. 2.

Standard No. 3 requires the supervising pharmacist to notify the Board of Pharmacy when an applicant for registration begins employment under supervision and when he leaves employment. It seems to me that this is a reasonable requirement that would come both under your regulatory power and as a phase of satisfactory evidence of experience. In my opinion, you can adopt this Standard.

Standard No. 4 is of the same nature as Standard No. 3 except that it requires the person working under a pharmacist for experience to notify the Board of Pharmacy of the beginning and end of employment within five days of such beginning or ending. For the reasons expressed under No. 3, I am of the opinion that your Board has authority to adopt Standard No. 4.

Standard No. 5 requires claims of practical experience to be corroborated by records on file in the Board office showing the beginning and ending of the practical experience, such corroborative evidence to be supplied by the applicant and the supervising pharmacist during the training period. So far as our statute is concerned, this is but a precaution in obtaining satisfactory evidence of experience; and I am of the opinion that your Board can adopt Standard No. 5.

Standard No. 6 simply states in a blanket statement that credit for practical experience will only be allowed when it is obtained in a pharmacy acceptable to the Board of Pharmacy for that purpose. This Standard is so general that it could be interpreted as being in compliance with our statute or not authorized by our statute, depending upon the administration of the Standard by the Board. I will assume, therefore, that a reasonable interpretation will be placed upon this Standard and that the Board

will not arbitrarily and capriciously say that a pharmacy is not acceptable if it is actually able to furnish experience to an applicant; and, therefore, I am of the opinion that the Board can adopt this Standard.

Standard No. 7, as it now stands, cannot be adopted by the Board of Pharmacy of this State because it imposes a requirement that the supervising pharmacist must have been a registered pharmacist for at least five years. This adds a requirement that is totally outside of our statute. Applicants, under our statute, are only required to have four years' experience in pharmacy under the instruction of a licensed pharmacist. It seems to me, furthermore, that this Standard is objectionable because it requires the supervising pharmacist to be the owner, manager or conductor of the pharmacy. Under our statute, I think the four years' experience could well be obtained under the supervision of a registered pharmacist who is a mere employee of the pharmacy and not the owner, manager or conductor of the pharmacy. I cannot, therefore, recommend that your Board has the authority to adopt Standard No. 7.

Standard No. 8 is written in general terms and pertains to the equipment, reference works, journals, etc., available at a pharmacy where applicant is obtaining experience. I am of the opinion that this falls within the regulatory power of your Board and that it also may be classed as a method of requiring sufficient proof or evidence of experience. I think you can adopt this Standard so far as the statement in the first paragraph of No. 8 is concerned. You will note that No. 8 contains four subsections. Subsection (a) of No. 8, in my opinion, can be adopted by your Board. As to subsection (b) of Standard No. 8, I am somewhat doubtful as to this requirement; but it may be that this would fall within your power to make regulations and to require satisfactory proof of experience. I will, therefore, resolve this doubt in your favor and say that, in my opinion, you can adopt subsection (b) of Standard No. 8. As to subsection (c) of Standard No. 8, I think that you have the authority to adopt this subsection. Subsection (d) of Standard No. 8 requires that pharmacy owner and the registered pharmacist supervising the practical experience of applicants for registration must be subscribed to the Code of Ethics of the American Pharmaceutical Association. If, by "subscribed to the Code of Ethics," you mean that the pharmacy owner and the supervising pharmacist agree to abide by this Code, then I think this subsection is all right. I do not think, however, that you can compel any pharmacist or owner of a pharmacy to join the American Pharmaceutical Association or to apply for membership. I have examined the Code of Ethics, and I do not see anything in the Code that would not meet the approval of any ethical pharmacist. Frankly, I rather doubt your authority and ability to compel pharmacists to subscribe to any Code of Ethics as I do not find such power in your Pharmacy Law. Of course, there are certain criminal offenses that pharmacists can commit, but these are described in our statute. I rather doubt the power of your Board to compel such action on the part of the pharmacists, and I see no reason why this could not be done by agreement. I am of the opinion that you cannot compel a pharmacist or owner of a pharmacy to subscribe to this Code of Ethics. I do not see in the statute any language which justifies the Board in prescribing a Code of Ethics for pharmacists.

Standard No. 9 requires the applicant working under a supervising pharmacist to keep a notebook certified to by the supervising pharmacist, which contains the details of his practical training; and the notebook is to be submitted as part of the application. I am of the opinion that your Board does have the authority to adopt this regulation or Standard.

NORTH CAROLINA BOARD OF PHARMACY; PUBLIC OFFICERS; FAILURE TO
QUALIFY AFTER APPOINTMENT; HOLDING OVER UNTIL SUCCESSOR
APPOINTED AND QUALIFIED; NORTH CAROLINA PHARMACEUTICAL
ASSOCIATION; POWERS IN DESIGNATING MEMBER OF
BOARD OF PHARMACY

20 May 1948

In your letter of May 13, 1948, you call my attention to Section 90-55 of the General Statutes, dealing with the election and appointment of members of the North Carolina Board of Pharmacy and reading as follows:

"The board of pharmacy shall consist of five persons licensed as pharmacists within this state, who shall be elected and commissioned by the governor as hereinafter provided. The members of the present board of pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and by-laws of said board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina pharmaceutical association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said board, and the pharmacist so elected shall be commissioned by the governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the state of any member of said board of pharmacy, the said board shall elect in his place a pharmacist who is a member of said North Carolina pharmaceutical association, who shall be commissioned by the governor as a member of the said board of pharmacy for the remainder of the term. It shall be the duty of a member of the board of pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law."

You also call my attention to one of the by-laws of the North Carolina Pharmaceutical Association dealing with the election of members of the North Carolina Board of Pharmacy, and this by-law is as follows:

"Section 5. The North Carolina Pharmaceutical Association shall elect at each annual meeting from among the most skillful pharmacists in North Carolina, for a term of five years, one pharmacist to the State Board of Pharmacy. The same must have been registered as a pharmacist in North Carolina at least five years previous to his election; he must be actually engaged in pharmacy; and shall not succeed himself; Provided that this does not prohibit the reelection of any member of the present board for one additional term."

As a basis for your question, you relate certain facts which I will briefly outline: In June, 1947, the North Carolina Pharmaceutical Association elected as its member of the North Carolina Board of Pharmacy Mr. C. R.

Whitehead who was to succeed Mr. Roger A. McDuffie; and it was the intention of the Association for Mr. Whitehead to serve for a term of five years, beginning April 28, 1948, according to the statute above quoted. Mr. Whitehead was issued a commission by Governor Cherry, as provided by the statute, for the regular five-year period beginning April 28, 1948. Shortly after Mr. Whitehead received his commission from the Governor, Mr. Whitehead tendered his resignation because of ill health; and I assume his resignation was accepted. Mr. Whitehead never did qualify for his term of office by appearing before the clerk of the Superior Court of the county in which he resided and subscribing to the regular oath to properly and faithfully discharge the duties of his office within ten days after the receipt of his appointment and commission. It should perhaps be stated that irrespective of any ten days, he never, at any time, took the oath of office and thereby never qualified himself for such office. It will thus be seen that Mr. Whitehead never did intend to qualify and take the oath of office because of his resignation on account of ill health.

Upon this statement of facts and considering same in connection with the applicable statute and by-law, you submit to this office certain questions as follows:

1. Does Mr. McDuffie remain as a member of the Board of Pharmacy until his successor has qualified?
2. If so, how shall his successor be elected, by the North Carolina Pharmaceutical Association or by the North Carolina Board of Pharmacy?
3. If it is found that the North Carolina Pharmaceutical Association must hold an election for the purpose of electing a member of the Board created by Mr. Whitehead's resignation, is the requirement prohibiting a member from succeeding himself binding in this particular case or, in other words, is Mr. McDuffie eligible for re-election to succeed himself?
4. If it is found that the vacancy is to be filled by the remaining members of the Board of Pharmacy, would the requirement of the by-laws of the Pharmaceutical Association prohibiting a member from succeeding himself be binding upon the Board of Pharmacy in making the selection of Mr. Whitehead's successor?

Before answering your questions specifically, I desire to deal with the status of Mr. Whitehead upon his resignation and his failure to qualify for office and also the validity of the by-law above quoted as passed by the North Carolina Pharmaceutical Association.

Of course, the above-quoted statute, which provides the machinery for electing members of the Board of Pharmacy and filling vacancies, requires that any person, whether designated by the Pharmaceutical Association or appointed by the Board of Pharmacy, to appear before the clerk of the Superior Court of the county in which he resides and to take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. This is a qualification which must be complied with before such an appointment makes a man a legal member of the Board of Pharmacy or, as we say in legal language, a *de jure* member of the Board of Pharmacy. Section 90-55 of the General Statutes, above quoted, provides that any pharmacist elected to the Board of Pharmacy shall hold his office for the stated term "and until his successor has been duly elected and quali-

fied." This, of course, is nothing but the general law that applies to all public officers and is also found in the chapter on public officers in the General Statutes, Section 128-7, which states: "All officers shall continue in their respective offices until their successors are elected or appointed, *and duly qualified.*"

So far as the information before me is concerned, it does not appear that Mr. Whitehead ever exercised any of the duties of his office, attended any official meetings of the Board or ever, at any time, attempted to act as a member of the Board of Pharmacy. Communications by letters would not, in any way, invalidate what I have said. We are, therefore, of the opinion that Mr. Whitehead never, at any time, became a member of the Board of Pharmacy; and he did not complete the necessary steps to qualify himself for such office by taking the required oath. Mr. Whitehead, therefore, was never, at any time, a legal member of the Board of Pharmacy prior to his resignation; and, therefore, it follows that he never did vacate any office nor does any vacancy exist because of his appointment.

I now deal with the by-law passed by the North Carolina Pharmaceutical Association. It will be noticed that this by-law attempts to set up certain qualifications that a member must have before he can be elected a member of the Board of Pharmacy. This by-law says that before a member of the Pharmaceutical Association can be a member of the Board of Pharmacy, he must (1) be one of the most skillful pharmacists in North Carolina; (2) have had this status of one of the most skillful pharmacists in the State for a period of five years previous to his election; he must have been registered for this period of five years; (3) be actually engaged in the practice of pharmacy; (4) he shall not be eligible to succeed himself as a member of the Board.

Section 90-55 of the General Statutes, which is the law controlling the election of members of the Board of Pharmacy as well as filling vacancies on the Board, simply provides that the North Carolina Pharmaceutical Association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said Board. The membership of the Board is staggered so that the term of one member expires every year. It will be noticed, therefore, that the statute does not set up any such qualifications or conditions of eligibility for this office as is required in the by-laws of the Pharmaceutical Association. The statute only requires that an individual shall be a resident pharmacist and a member of the Pharmaceutical Association in order to hold this office. We are utterly unable to find any authority or power on the part of the Pharmaceutical Association to set up and require these superadded qualifications. Since Section 90-55 of the General Statutes is careful to fix the qualifications and powers for a member of the Board of Pharmacy, we do not think that the North Carolina Pharmaceutical Association has any power and authority to set up, through a by-law, other and additional qualifications for this office. The Pharmaceutical Association derives its authority from the statute, and the statute does not vest it with authority to create additional qualifications in electing a member to the Board of Pharmacy. There is, therefore, no power under the statute that, either directly given or implied, provides for other or more stringent qualifications for this office to be created by the Association. This is not a new principle, and it might

be pointed out by way of analogy that the Constitution of the State fixes the qualifications of certain constitutional officers. This having been done, the Legislature itself cannot create and impose other qualifications. See *STATE EX REL SPRUILL v. BATEMAN*, 152 N. C. 589; *LEE v. DUNN*, 73 N. C. 595. So far as we can see, this principle prevails in nearly all jurisdictions. It follows, therefore, that the above-quoted by-law of the North Carolina Pharmaceutical Association is, in our opinion, invalid, void and of no effect. The superadded requirements that a member must be one of the most skillful pharmacists in North Carolina, must be registered as a pharmacist in North Carolina for at least five years previous to his election, must be actually engaged in the practice of pharmacy and shall not succeed himself in office are invalid requirements and are not enforceable by law. The only requirements fixed by law are that a man must be a member of the Pharmaceutical Association and a resident pharmacist. It should be noticed that I am not saying that the Pharmaceutical Association cannot impose qualifications and conditions on the pharmacists of the State before a man can be a member of the Pharmaceutical Association; but once he is a member of the Pharmaceutical Association and is a resident pharmacist, that is all that is required to be a member of the North Carolina Board of Pharmacy, and no other requirements can be enforced unless and until the General Assembly of the State sees fit to add these qualifications by statute.

I, therefore, answer your question No. 1 that Mr. McDuffie is now a member of the Board of Pharmacy; and, under the law, he remains a member of the Board of Pharmacy until his successor has been duly appointed and qualified.

I answer your question No. 2 that since Mr. Whitehead has never held office and has never qualified, Mr. McDuffie's successor should be elected by the North Carolina Pharmaceutical Association; and this will not be filling a vacancy but will be an original appointment.

I answer your question No. 3 that Mr. McDuffie is eligible to succeed himself in office if the Pharmaceutical Association sees fit to elect him again.

I answer your question No. 4 by saying, as I have said before, that the Pharmaceutical Association will elect Mr. McDuffie's successor and that the by-law above quoted is invalid, void and is not warranted by law. It follows, therefore, that whenever any vacancy does occur, which is filled by the Board of Pharmacy, in such case, the Board can elect an officer to succeed himself on the Board.

OPINIONS TO STATE COMMISSION FOR THE BLIND

COMMISSION FOR THE BLIND; BUREAU OF EMPLOYMENT FOR THE BLIND;
PUBLIC OR PRIVATE AGENCY

25 July 1946

In your letter of July 24, 1946, you call attention to the fact that the Bureau of Employment for the Blind was created under the provisions of Section 111-5 of the General Statutes of North Carolina, and also by virtue of a resolution adopted by the North Carolina State Commission for the Blind, a copy of which resolution is enclosed in your letter.

You would like to know if the Bureau of Employment for the Blind is a private agency, a private non-profit corporation, or if it is a public agency or division of the North Carolina State Commission for the Blind.

I quote Section 111-5, which is as follows:

*"Information and aid bureaus.—*The commission shall maintain or cause to be maintained one or more bureaus of information and industrial aid, the object of which shall be to aid the blind in finding employment and to teach them trades and occupations which may be followed in their own homes, and to assist them in whatever manner may seem advisable to the commission in disposing of the products of their home industry."

Pursuant to this provision of the law, the Commission for the Blind passed a resolution referring to the above quoted statute and also referring to Chapter 123 of the Public Laws of 1939, which provides in substance that the North Carolina State Commission for the Blind has authority to carry on activities to promote the employment of needy blind persons. The resolution further provided that the members of the Bureau of Employment for the Blind shall be the lay members of the commission, the Executive Secretary of the commission, and such citizens as they may select, such persons to have had specialized experience in the field of sales and merchandising. Other powers were delegated to the Bureau of Employment for the Blind in this resolution and it is especially noted that the policies adopted by the bureau and the ways and means of financing the program are subject to the approval of the State Commission for the Blind.

From the statute above referred to, as well as the resolution, it seems clear to us that the North Carolina Bureau of Employment for the Blind, as organized and constituted, is a public agency and is in essence a creature or division of the North Carolina State Commission for the Blind. This agency has none of the qualities of a private agency or of a private, non-profit corporation as such terms are understood in the law of our State.

AID TO THE NEEDY BLIND; ELIGIBILITY FOR RELIEF;
DEFINITION OF BLIND PERSONS

19 August 1946

In your letter of the 16th of August, 1946, you request this office to give consideration to the present definition of blindness as contained in the Public Laws of North Carolina, and to give your Commission an opinion on whether the North Carolina State Commission for the Blind has the legal right to approve aid to blind people and to spend public funds on individuals whose visions are restricted to the extent that a person cannot operate or function as a sighted person.

You state that occasionally a case is called to the attention of your Commission by a certified Ophthalmologist in which the person's visual accuity may be as great as 20/40 but his visual field is so restricted as to make it impossible for him to function as a sighted person.

Chapter 111, Section 6, of the General Statutes of North Carolina, provides, in part, that "Any portion of the funds appropriated to the North Carolina State Commission for the Blind under the provisions of this chapter providing for the rehabilitation of the blind and the prevention of blindness may, when the North Carolina State Commission for the Blind deems wise, be given in direct money payments to the needy blind in accordance with the provisions of §§111-13 to 111-26, and whenever possible such funds may be matched by funds provided by the Federal Social Security Act."

Section 13, of the above chapter, provides, in effect, that the North Carolina State Commission for the Blind is charged with the supervision of the administration of assistance to needy blind people under the law, and "said Commission shall establish objective standards for personnel to be qualified for employment in the administration of this article, and said Commission shall make all rules and regulations as may be necessary for carrying out the provisions of this article, which rules and regulations shall be binding on the Boards of County Commissioners and all agencies charged with the duties of administering this article."

Section 14 of the Act provides, in part, that any person claiming benefit under the law, "shall file with the commissioners of the county in which he or she has a legal settlement an application in writing, in duplicate, upon forms prescribed by the North Carolina State Commission for the Blind, which application shall be accompanied by a certificate signed by a reputable physician licensed to practice medicine in the State of North Carolina and who is actively engaged in the treatment of diseases of the human eye, to the effect that the applicant is blind or that his or her vision with glasses is so defective as to prevent the performance of ordinary activities for which eyesight is essential. . . ."

After the filing of this application this section provides that the Board of County Commissioners shall cause an investigation to be made to pass upon the eligibility of the applicant, and allow or disallow the relief sought, and when satisfied with the merits of the application, "the Board of County Commissioners shall allow the same and grant to the applicant

such relief as may be suitable and proper, according to the rules and standards established by the North Carolina State Commission for the Blind, not inconsistent with this article and in accordance with the further provision hereof."

Section 15, of this Chapter, defines blind persons and their eligibility for relief. Here, blind persons eligible for relief are defined as follows:

"(1) Whose vision with glasses is insufficient for use in ordinary occupations for which sight is essential; and

"(2) Who are unable to provide for themselves the necessities of life and who have insufficient means for their own support and who have no relative or relatives or other persons in this state able to provide for them who are legally responsible for their maintenance; and

"(3) Who have been residents of the State of North Carolina one year immediately preceding the application; and

"(4) Who are not inmates of any charitable or correctional institution of this state or of any county or city thereof: Provided, that an inmate of such charitable institution may be granted a benefit in order to enable such person to maintain himself or herself outside of an institution; and

"(5) Who are not publicly soliciting alms in any part of the state, and who are not, because of physical or mental condition, in need of continuing institutional care."

Section 16, of the Chapter, provides that the North Carolina State Commission for the Blind shall receive a copy of the application for relief, and in the event relief has been denied by the County Commissioners the Blind Commission may, in accordance with the procedure therein set forth, refuse the finding of the County Commissioners, or either approve the finding of the Commissioners, or grant aid, and the decision of the Commission is final.

Under the statutes above referred to, it is the opinion of this office that the North Carolina State Commission for the Blind has authority to set up standards not inconsistent with the section defining blind persons who are eligible to relief referred to above, and should the Commission find that under these standards any person in this State is qualified for relief as a needy blind person public funds may be expended for such relief in accordance with the provisions of the law and regulations, and a determination by the Commission would be binding upon the County Commissioners of the various counties of the State.

STATE COMMISSION FOR THE BLIND; QUALIFICATION OF BENEFICIARIES; CITIZENSHIP

4 September 1946

In your letter of the 28th of August, 1946, you request an opinion from this office as to whether or not there is any authority for the Commission to furnish assistance to a blind person qualified under the Act to receive benefits who is not a citizen of the State.

It is true that nowhere in our state law, in this respect, will be found a provision that a person must be a citizen of this State before becoming eligible to receive aid from the Commission. Your attention is invited, how-

ever, to Chapter 111, Section 11, of the General Statutes, where it will be found that no person shall benefit from the provisions of the Act, "unless he has been a resident of North Carolina for at least one year next preceding the receiving of such benefit."

It is not necessary that a person be a citizen of this State in order to become a resident hereof. A person might reside here for a number of years without taking out citizenship papers and still be a resident of this State. Since it appears that the only requirement in so far as this particular aspect of eligibility is concerned is that he be a resident for one year prior to the receipt of any benefit, it is thought that the fact the person to whom you refer is an alien, but otherwise qualified to receive benefits, would not defeat his eligibility for benefits under the law.

STATE COMMISSION FOR THE BLIND; QUALIFICATION OF BENEFICIARIES;
LEGAL SETTLEMENTS

5 September 1946

in your letter of the 28th of August, 1946, you request consideration of this office to the present definition of legal county residence of an Aid to the Blind recipient who marries and moves to another county in this State, which is the county of legal settlement of her husband, and you request an opinion from this office on the legal basis for termination of an Aid to the Blind award by your Commission. You state that this question has arisen in one of the counties of the State which has requested a termination of a case on the basis of "loss of legal settlement through marriage."

Chapter 111, Section 14, of the General Statutes of this State, provides in part that any person claiming benefit under the Act shall file with the Commissioners of the county in which he or she has a legal settlement an application in writing, and upon consideration of such application, in the manner provided therein, and upon approval of the State Commission for the Blind a person may be entitled to receive the benefits under the Act. Section 15 of the Act sets forth the qualifications for blind persons who may be eligible for relief under the Act. Your attention is specifically invited to Subsection 2, of this Section, which is as follows:

"Who are unable to provide for themselves the necessities of life and who have insufficient means for their own support and who have no relative or relatives or other persons in this State able to provide for them who are legally responsible for their maintenance."

Under the laws of this State a wife acquires legal settlement of her husband, and in the instant case the woman having married a person of another county she has acquired legal settlement of her husband and it is no longer the responsibility of the county from which she removed to provide aid under the act, but it would be the responsibility of the county to which she removed provided her husband is unable to provide for her support. If he is able to so provide then this person would become ineligible for relief under the provisions of the section quoted above.

AID TO THE NEEDY BLIND; DISCLOSURE OF NAMES OF RECIPIENTS OF ASSISTANCE; MINUTES OF COUNTY COMMISSIONERS; PUBLICATION OF NAMES OF RECIPIENTS IN NEWSPAPERS; SPECIAL AND GENERAL STATUTES DEALING WITH PUBLICATION OF FISCAL AFFAIRS OF COUNTY; PROHIBITION AGAINST DISCLOSURE OR PUBLICATION OF NAMES OR LISTS OF NAMES OF RECIPIENTS OF AMOUNTS PAID AS AID TO THE BLIND

4 December 1946

In your letter of inquiry to this office, you state that the Aid to the Needy Blind Program is administered by the North Carolina State Commission for the Blind in cooperation and in conformity with the appropriate subchapter of the Federal Social Security Act. Under Federal requirements all state plans for the administration to this program provide that records pertaining to recipients of Aid to the Blind are to be kept confidential. Lists of such recipients, together with amounts of payment may not be published. You further state that it has recently been brought to your attention that in a county in North Carolina, minutes of the meetings of the county commissioners are published; and these minutes include the names and action taken on Aid to the Blind cases.

You would like to know if such disclosure or publication of the names and action taken on Aid to the Blind cases is a violation of either Federal or State statutes, or both, governing the confidential nature of these records.

Most of the Federal laws governing grants to state for aid to the blind are found in Subchapter X of Chapter 7 of the Social Security Act (Title 42, United States Code Annotated, Section 1201, et seq.) Grants of money are made by the Federal Government to those states whose plans for Aid to the Blind are approved by the Federal Government, acting through the Social Security Board. The states' plans must contain certain requirements which are set forth in Section 1202(a) of Subchapter X of the Social Security Act. Among other things, the states themselves must participate in the financial part of the plan, provide certain methods of administration, observe certain conditions of eligibility; and Paragraph (9) of Subsection (A) of Section 1202 of the Social Security Act requires, in order to receive Federal grants, that a state must "provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of Aid to the Blind." [Title 42, U.S.C.A., Section 1202(a).] It is further provided in Section 1204 of this same title and subchapter as follows:

"§1204. Change in or failure to comply with plans; stopping payments.

"In the case of any State plan for aid to the blind which has been approved by the Board, if the Board, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds . . . (2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 1202 of this title to be included in the plan; the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that such prohibited requirement is no longer so imposed, and that there is no

longer any such failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State."

From the above-quoted section of the Federal Social Security Act, it is clear that if a state fails to comply with the condition set forth in Section 1202(a), which includes Paragraph 9 as quoted above, then and in that event, after notice to the state and after opportunity for the state to be heard before the Social Security Board, the Social Security Board has a right to declare that the state plan for administering the program of Aid to the Blind is not being administered in conformity with the Federal law; and upon such finding, the Social Security Board will order all funds paid to the state or to be paid to the state for Aid to the Blind purposes to be discontinued until the Board is satisfied that the prohibited requirement is no longer in operation and that the administrative agency of the state is conforming to and complying with the requirements of the state plan as fixed by the Social Security Act. Unless a state meets these requirements, the Social Security Board will not make any further certification to the Secretary of the Treasury of the United States with respect to such state or in other words, all Federal funds for Aid to the Blind are cut off.

The statutes of North Carolina governing Aid to the Blind are found in Article 2 of Chapter 111 of the General Statutes. Under Section 111-24 of the General Statutes, the North Carolina State Commission for the Blind is authorized to cooperate with the Federal Social Security Board and to do any and all things necessary in order to conform the State plan with the requirements of Subchapter X of the Federal Social Security Act; and it is further provided in this section that the North Carolina Commission for the Blind is authorized to "comply with such regulations as said Board may from time to time find necessary to assure the correctness and verification of such reports." Aside from any Federal control in the matter, the General Assembly of North Carolina has passed its own statute forbidding the disclosure of the name or names or any information concerning persons applying for or receiving Aid to the Needy Blind. The last paragraph of Section 111-28 of the General Statutes of this State is as follows:

"It shall be unlawful, except for purposes directly connected with the administration of aid to the needy blind and in accordance with the rules and regulations of the State Commission for the Blind, for any person or persons to solicit, disclose, receive, make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or name of, or any information concerning, persons applying for or receiving aid to the needy blind, directly or indirectly derived from the records, papers, files, or communications of the State Commission for the Blind or the board of county commissioners or the county welfare department, or acquired in the course of the performance of official duties."

There are many statutes dealing with the publication of reports and methods of making public the actions taken by county commissioners and making known information concerning the finances and fiscal affairs of counties. For example, Section 153-41 of the General Statutes gives the duties of the clerk to the Board of County Commissioners; and among these duties, the clerk must keep the books and papers of the board free

for examination by all persons. Section 153-43 of the General Statutes provides that a finance committee may publish in a newspaper a detailed and itemized account of the condition of the county finances. Section 153-60 of the General Statutes provides that all county officers must make an annual report to the board of commissioners of an itemized and detailed account of public funds received and disbursed. Section 153-68 of the General Statutes provides that the board of commissioners within five days after each regular December meeting shall publish a statement of the county's revenues and charges showing by items the income from every source and the disbursements on every account for the past year. It is further provided that this shall be published also in some newspaper in the county. Section 153-123 of the General Statutes provides for a publication of the financial condition of the county at the time of the submission of the supplemental budget. There are perhaps other statutes dealing with this question.

All of these laws that I have called your attention to were passed by the General Assembly prior to the passage of Section 111-23 of the General Statutes which forbids the publication of the names of recipients of assistance to the blind. Furthermore, in Section 111-28, it is provided that the North Carolina State Commission for the Blind is authorized and empowered to establish and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files, and communications of the department.

In view of the Federal statutes and its requirements and in view of our own Act (Section 111-28 of the General Statutes), I am of the opinion that our State law prohibits the publication of any names of recipients of Aid to the Blind and that boards of county commissioners are required by law to comply with this Act and to withhold the names of such recipients from their public minutes, fiscal reports, and publications made in newspapers. It is furthermore, in my opinion, unlawful for any person to publish the names of these recipients no matter how the information is acquired, if such information comes directly or indirectly from the papers and record of the board of county commissioners or from any member of the board in any manner whatsoever. The same is true of any information in this respect received from the State Commission, its officers, agents, files, records and papers. The provisions of the Federal Act in conjunction with the State statute have the effect of repealing so much of the statutes that I have cited above regulating the affairs of county commissioners as would require the publication of these names. I think, however, that the statute prohibiting the disclosure of these names should be construed in harmony with the statute governing the fiscal affairs of county commissioners and that it would be permissible for the commissioners to publish as statistical data the amounts appropriated at different times or through the year for the program provided the names of the recipients are not disclosed and are not published. At any rate, I am sure that it is a violation of the law to include the names of such recipients in the public minutes of the county commissioners or for the commissioners to in any manner disclose the names of these recipients to anyone unless such disclosure is made in the administration of the Aid to the Blind law and to the proper agents or officials.

What I have said in regard to the general laws of the State is also true in my opinion where some county has a public-local statute requiring the minutes and affairs of the county commissioners to be published either at the court house door or in some newspaper. The last paragraph of Section 111-28 provides that the State Commission can promulgate rules and regulations as to the disclosure of these names. Such rules and regulations in my opinion together with the General Statutes would prohibit such a disclosure of the names of recipients or lists of the names of the recipients even though a public-local law has been passed for the reason that the Federal statutes augmented by the State statute and the regulations, in my opinion, would be superior to and would control any public-local law in this respect. Such regulations have been adopted by the State Commission for the Blind and appear as Sections 46-10, 46-11, 46-12 of the 1943 Manual for the Administration of the Aid to the Blind Program.

I advise, therefore, that no board of county commissioners, and for that matter, that no person publish, disclose or in any manner make public the names of recipients of Aid to the Blind and that all such information is confidential. If any officials or persons insist upon making such disclosure or publications, in my opinion, it will not only result in a violation of the law on the part of such persons or officials but in the end the Federal Social Security Board will declare the State plan for administration of Aid to the Blind is not in conformity with the Federal Act and will cease to pay or advance any payments or grants-in-aid to the State and will cut off all financial assistance, thus causing much suffering to our handicapped blind citizens.

AID TO THE NEEDY BLIND; ESTABLISHMENT OF COUNTY RESIDENCE

19 September 1947

In your letter of the 12th of September, 1947, you make reference to the 1947 amendment to the General Statutes relating to aid to the needy blind, Chapter 374 of the Session Laws of 1947, and inquire if the amendment would have the effect of including within its terms applicants for aid under the Act or does it apply only to recipients or persons who are already receiving aid under the Act.

This Act has been examined and it appears that the amendment is added on to the end of the Section, G. S. 111-19. In view of this fact, and in further view of the fact that the residence requirements for applicants for aid is set out in the first part of the Act and not changed by the 1947 amendment, and that the 1947 amendment refers only to "recipients," it is not thought that applicants for aid are included within its terms.

AID TO THE NEEDY BLIND; ESTABLISHMENT OF LEGAL SETTLEMENT

14 October 1947

In your letter of the 10th of October, 1947, you request this office for an opinion as to what constitutes the length of time required for a person to acquire a legal settlement in a county in this State.

G. S. 153-159 sets forth the manner in which a legal settlement may be acquired. One of these requirements is that every person who has resided continuously in a county for one year shall be deemed legally settled in that county.

The three months' residence in a county in this State which permits persons, otherwise qualified, to vote in such county has no application to the legal requirement for acquiring a settlement within the meaning of the Aid to the Needy Blind Act.

OPINIONS TO PROBATION COMMISSION

PROBATION; CRIMINAL LAW; SENTENCE; COMPLETION OF SENTENCE

18 October 1946

Your letter, with attached copy of judgment, shows that on February 15, 1946, one W. A. Fetner entered a plea of guilty to larceny in nine cases and was sentenced by the Honorable Paul F. Smith, Judge, for a period of three years, which sentence of three years was suspended and the defendant placed on probation for a period of five years. As a special condition of probation, the following is set forth:

"This probation judgment to begin at the expiration of an eighteen (18) months sentence imposed in three (3) cases; pay the costs, and make restitution to the S & W for stolen articles as enumerated in the nine warrants."

As shown above, this judgment was entered by Judge Smith on February 18, 1946; and on September 1, 1946, this defendant received a parole. You would, therefore, like to know when the probation portion of the judgment takes effect and on what date you should accept supervision of this defendant.

Your question in essence really raises the question as to the time that shall be legally counted as part of the term of sentence. In Volume 24, C. J. S. (Criminal Law) Section 1995 (D) (5), p. 1233, the following is found with reference to the counting of time on parole:

"In some jurisdictions the time that a prisoner is out on parole may be credited toward fulfillment of his term, although periods out of prison elapsing after a convict has broken his parole cannot be credited. Credit may be denied for time out on parole where the convict has committed and been convicted of a second offense while on parole from punishment for the first offense, nor may a prisoner count toward one sentence time served under another sentence imposed for crime committed during parole, the parole being revoked on commission of the second crime. Under some statutes the convict when rearrested must be imprisoned for a period equal to the unexpired term of his sentence at the time his delinquency is declared, *and some authorities hold that on revocation of a parole during the term of the sentence the prisoner must serve the term of his original sentence without credit for the time during which he was lawfully at large prior to revocation of parole, as where the parole is so conditioned, or under statutes showing a definite legislative policy to deny credit to prisoners for time at large on parole*, although he may be entitled to credit for time lawfully on parole where his violation of parole consists of a mere infringement of rules and not commission of another crime, and even in such jurisdictions the prisoner is entitled to credit after revocation of parole for time actually spent in prison prior to granting of the parole or conditional pardon." (Italics ours).

It is believed that the policy of our Parole Commission is expressed in the words that I have underlined above; and that is, when a parole is revoked, the time spent at liberty by the prisoner on parole is not counted

as a part of the sentence, and the prisoner must go back and pick up the balance of the unexpired term. Technically, when a man is paroled, he is under the supervision of the Parole Commission for an indefinite length of time; and it has been the policy of our Parole Commission to have the sentence commuted by an executive order when the Commission wishes to finally discharge the prisoner from parole supervision.

Under the circumstances, therefore, it is the opinion of this office that you would not assume supervision of this prisoner on probation until he is discharged by the Parole Commission. Technically, the sentence is not terminated nor does the term of sentence actually end until such prisoner is discharged by the Parole Commission. It is our opinion, therefore, that you would disregard the expiration of the eighteen months sentence as the beginning time of probation since a parole has now supervened, and you will follow entirely the termination of the sentence as fixed by the discharge from parole whatever time that may be.

PROBATION COMMISSION; EVIDENCE; REVOCATION HEARING;
RULES OF EVIDENCE

5 February 1948

In your letter of the 2nd of February, 1948, you make reference to an official opinion of this office dated the 28th of September, 1940, wherein the opinion was expressed that the rules of evidence did not apply in those cases where a probation revocation hearing is held before the judge of any of the courts of this State.

You also make reference to the case of *STATE v. SULLIVAN*, 227 N. C. 680, and inquire if the decision in this case would in any way modify the opinion heretofore rendered by this office on this subject.

The above case has been examined and I am of the opinion that it has no application to the situation with which you are confronted. The opinion in the *SULLIVAN* case merely holds that there was insufficient evidence before the Court to support the finding that the defendant had violated the conditions of a judgment theretofore pronounced against him.

I have been unable to find any North Carolina cases on this subject; and various texts have been studied, and I find support for the position heretofore taken by this office in the following excerpt from 31 C. J. S., page 945:

"A strong reason for the exclusion of hearsay is found in the distrust of the ability of a jury to give the proper weight to an unsworn statement, as only a well trained mind can give such a statement any weight without grave danger of giving it undue weight. This reason is not present where the evidence is addressed solely to the judge, to enable him to decide matters of fact, or to determine as to the exercise of discretion, and consequently the rule is considerably relaxed under such circumstances."

COMPACTS WITH OTHER STATES; NECESSITY FOR LEGISLATIVE APPROVAL

17 March 1948

I received your letter of March 17, in which you request my opinion as to whether or not it would be necessary for the General Assembly to pass an Act authorizing your Commission to enter into an Interstate Com-

pact with the Probation Commissions of other states. You advise that while not a member of the Interstate Compact now existing, you have cooperated with the member states and have tried to abide by their rules and regulations.

I believe it is customary and legally necessary to have specific authority of the General Assembly for your Commission to enter into an Interstate Compact Agreement. I, therefore, would recommend, if you contemplate signing the Compact, that an Act of the General Assembly be secured, authorizing this to be done.

RECORDER'S COURT, HENDERSON COUNTY

12 May 1948

In your letter of the 11th of May, 1948, you inquire if the Henderson County Recorder's Court in Hendersonville is a Court of record and would come under the Courts which the Probation Commission serves.

The Recorder's Court of Henderson County was abolished by Chapter 97 of the Public Laws of 1937. However, in 1939, by Chapter 238 of the Public Laws of that year, Henderson County was brought under the provisions of Article 19 of the Consolidated Statutes entitled "County Recorders' Courts," which is C. S. 1563 and following. This article authorizes the county commissioners of any county in which a municipal Recorder's Court has not been established to establish, in the manner provided by the article, a Recorder's Court to be held at the county seat and provides that such Court shall be a Court of record. Article 19, above referred to, is now Article 25 of Chapter 7 of the General Statutes; and it will be noted that the statute as now written provides that Courts established thereunder shall be Courts of record. You are advised, therefore, that the Henderson County Recorder's Court, having been established under the statutes above referred to, is a Court of record and is one which comes under the Courts which the Probation Commission serves.

OPINIONS TO BOARD OF ELECTIONS

AUTHORITY TO PERMIT FEDERAL BUREAU OF INVESTIGATIONS TO EXAMINE ABSENTEE BALLOTS AND OTHER ELECTION MATTERS IN POSSESSION OF THE STATE BOARD OF ELECTIONS

29 March 1947

I received your letter of March 28, enclosing a copy of a letter to you from Mr. Thomas A. Uzzell, Jr., Assistant United States Attorney, requesting that you permit Mr. Everett Ingram of the Federal Bureau of Investigations to examine the applications for absentee ballots, lists of absentee ballots filed with application, absentee ballots cast, the poll book and other matters in connection with the Polk County election. You request me to advise you of your authority and duty in this matter.

I am unable to cite you any specific statutory provisions dealing with this subject, or any decisions of our Court, which would seem to be in point. It is my opinion, however, that the request of the Assistant United States Attorney should be granted, as this would be an official investigation by the Federal Bureau of Investigations of data in the hands of a public official of this State. In permitting the examination of these documents, I do not think we would be conceding that the Federal Government has any responsibility in the supervision of the elections which are conducted under authority of the State of North Carolina.

ELECTIONS; REGISTRATION OF VOTERS IN SECOND PRIMARY

31 May 1948

In conference with you today you state that the question has been raised as to the registration of voters between the first and second primary.

The Election Laws provide, in G. S. 163-140, in part, as follows:

"If a second primary be ordered by the State or a county board of elections, it shall be held four weeks after the first primary, in which case such second primary shall be held under the same laws, rules, and regulations as are provided for the first primary, except that there shall be no further registration of voters other than such as may have become legally qualified after the first primary election, and such persons may register on the day of the second primary, and shall be entitled to vote therein under the provisions of this article."

The italicized portion of this section, I believe, answers the question which has been raised. Only those voters who have become legally qualified after the first primary election can register and vote in the second primary. To illustrate the point, if the voter will be twenty-one years of age before the November election, he would have been under our law legally qualified to have registered and voted in the first primary. If he failed to register in the first primary, he could not register and vote in the second primary, as he did not become legally qualified to vote after the first primary.

Those who might register under this proviso, after the first primary, would be persons who may have had sanity restored after that date or who had had their citizenship restored after that date, or a person who had become naturalized.

NEW POLITICAL PARTIES; PLACING NAMES ON BALLOTS OF CANDIDATES FOR GOVERNOR AND OTHER STATE OFFICERS

18 June 1948

You have requested my opinion as to the authority of the State Board of Elections to print on the official ballots, to be used in the November election, the names of candidates of a new political party, if a new political party is organized as provided by law after the date for holding of the primary election and prior to the first day of September in this election year.

In 1932 former Attorney General Dennis G. Brummitt expressed an opinion, which is published in the Biennial Report of the Attorney General of North Carolina, 1930-1932, beginning at page 217, in which he stated:

"I reach the conclusion, then, that the State Board of Elections may, in accordance with the authority conferred upon that body by section 37 of Chapter 164, Public Laws of 1929, quoted above, make such reasonable and appropriate rules and regulations as it may deem necessary for the placing of the names of nominees for presidential electors of other political groups or parties upon the official ballot. Your Board could not now permit the placing on the official ballot of the names of nominees for State offices of such other political groups or parties, for the reason that candidates for these offices are required to be nominated in the primary.

"Your Board would have the right to name the date by which its rules and regulations on the subject must be complied with, in order that the names of nominees for such presidential electors may be placed on the official ballot."

This letter was written in response to the demand of a person claiming to be a representative of the Socialist Party with respect to placing upon the ballot the names of candidates of that party for presidential electors. No question was raised at that time as to the placing upon the ballots of the names of the candidates for the office of Governor and other State offices.

Attorney General Brummitt quoted in this letter the provisions of the elections laws then in effect relating to this subject but since that time several provisions in the election laws, to which he referred, have been amended and changed by the Legislature.

The pertinent laws bearing on this subject are as quoted in this letter.

G. S. 163-1 provides as follows:

"A political party within the meaning of the election laws of this State shall be any group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, in the State at least three per cent of the entire vote cast therein for Governor or for presidential electors; or any group of voters which shall have filed with the State Board of Elections, at least

ninety days before a general State election, a petition signed by ten thousand qualified voters, declaring their intention of organizing a State political party, the name of which shall be stated in the petition together with the name and address of the State chairman thereof, and also declaring their intention of participating in the next succeeding election. No such group of electors shall assume a name or designation which shall be so similar, in the opinion of the State Board of Elections, to that of an existing political party, as to confuse or mislead the voters at an election. When any new political party has qualified for participation in an election as herein required, and has furnished to the State Board of Elections the names of such of its nominees as is desired to be printed on the official ballots by the first day of September prior to the election, it shall be the duty of the State Board of Elections to cause to be printed on the official ballots furnished by it to the counties the names of such nominees. When any political party fails to cast three per cent of the total vote cast at an election for Governor, or for presidential electors, it shall cease to be a political party within the meaning of this chapter."

In the primary law provisions are made for the nomination of the candidates of political parties for the office of Governor and all State offices, Justices of the Supreme Court, Judges of the Superior Court, United States Senators, Members of Congress and Solicitors. Each candidate for these offices is required to file a declaration of his candidacy and pay at the time the prescribed fees to the State Board of Elections.

In G. S. 163-128 it is provided as follows:

"Only those who have filed notice of their candidacy and who shall have complied with the requirements of law applicable to candidates before primaries with respect to such primary elections shall have their names printed on the official ballot of their respective political parties. In all cases where only one aspirant for nomination for a particular political office to be voted for by his political party on the State or district ballot or, for the State Senate in districts composed of two or more counties shall have filed such notice, the Board of Elections of the State shall, upon the expiration of the time for filing such notices, declare him the nominee of his party, and his name shall not, therefore, be placed on the primary ballot, but shall be placed on the ballot to be voted at the general election as his party's candidate for such office."

G. S. 163-144 provides as follows:

"A political party within the meaning of the primary law shall mean any political group of voters which, at the last preceding general election, polled at least three per cent of the total vote cast therein for such offices as are described in Section 1."

By reason of the provision of G. S. 163-144, last above quoted, I agree with the contention that is made that the primary election law, found in Article 19 of Chapter 163 of the General Statutes, does not apply to the candidates of a new political party, if the new political party is organized in compliance with the provisions of G. S. 163-1, above quoted.

As will be seen from the quotation of G. S. 163-1, it is provided that when a new political party has qualified for participation in an election as therein required and has furnished to the State Board of Elections the

names of such of its nominees as are desired to be printed on the official ballots by the first day of September prior to the election, it is the duty of the State Board of Elections to cause to be printed on the official ballots, furnished by it to the counties, the names of such nominees.

If such new political party should fail to cast as much as three per cent of the vote cast for Governor or for presidential electors, it will cease to be a political party thereafter.

There has been no question but that a new political party, if organized, after the primary could have the names of its presidential electors printed upon the official ballots if such party in convention or in a formal way nominated such candidates, as we do not have any primary for the nomination of presidential electors. Since the opinion rendered by Attorney General Brummitt, the rule has been followed as stated by him that candidates for Governor and other State offices could be nominated only as provided in the primary law, which position was upheld by our Supreme Court to an organized political party in the case of *McLEAN v. DURHAM COUNTY BOARD OF ELECTIONS*, 222 N. C. 6.

However, for the reasons above given and based upon the statutes quoted, I am of the opinion that if a new political party is organized after the date for holding the primary and by September 1, 1948, if such party furnishes to the State Board of Elections the names of such of its nominees as it desires to have printed on the official ballots, it would be the duty of the State Board of Elections to print these names on the ballots to be furnished to the counties.

In rendering this opinion, I agree that the action heretofore taken by the State Board of Elections on this subject was justified, in view of the opinion rendered by former Attorney General Brummitt, as to which no change had been made in this office as no request had been made therefor.

The nominees of the new political party would be only those names which had been formally nominated by such political party in convention assembled. No individual claiming to represent such party would have the authority to name the candidates for the party. It would actually have to be a party nomination made in the usual and customary way in which political parties nominate candidates for office, and properly certified by the officers of such convention.

In the event the names of the candidates so nominated are not furnished to the State Board of Elections in time to be printed on absentee ballots, which must be printed and mailed prior to the first day of September, it would manifestly be an impossibility to include the names of such nominees thereon. I would advise, therefore, that the acts to be done by the Board with reference to printing and distributing tickets should be performed at the time required by the statute and, if at such time the names of candidates for the new party are not available, the printing of the tickets should not be delayed on account thereof but only those names of candidates then legally filed should be printed thereon.

OPINIONS TO STATE HOSPITALS. ETC.

VETERANS ADMINISTRATION; STATE HOSPITALS; AUTHORITY TO ASSUME CUSTODY OF FUNDS BELONGING TO PATIENTS

30 October 1946

In your letter of the 28th of October, 1946, you state that the Veterans Administration has requested your Institution to assume the role of legal custodian of certain patients in the Hospital, in order that the Veterans Administration may be given an accounting for any moneys paid into the Hospital for the care of these patients.

No authority exists for your Institution to assume the role of legal guardian for these veteran patients. Of course, you are the custodian of such patients who have been entered into your Hospital by the Veterans Administration, and would perhaps be required to give an accounting, upon request, to the Veterans Administration for moneys paid into the Hospital for their care and treatment. This is, as I understand it, however, a set expense and would not require any further bookkeeping than is now required of you in keeping the accounts of patients.

Even though not plainly stated in your letter, it would appear that the Veterans Administration is requesting that you assume the role of legal guardian for such veteran patients.

No legal authority exists for you to enter into such a relationship with your patients, and you are advised that you may not assume such a role.

STREET PAVING ASSESSMENTS; MUNICIPAL CORPORATIONS; STATE-OWNED PROPERTY

23 November 1946

In your letter of the 21st of November, 1946, you state that the Town of Morganton has rendered you a statement for street, sidewalk and sewer stubout assessments, and you inquire if there is any liability on the part of the State for assessments rendered against State-owned property.

This office has uniformly held over a long period of years, that State-owned property is not subject to the lien for paving assessments and that such property could not be sold for the nonpayment thereof. It is thought that the only way that payment could be obtained on account of such assessments would be through an act of the Legislature specifically making the appropriation and authorizing the payment thereof.

Bills have been introduced in several sessions of the General Assembly in the past, unsuccessfully seeking to secure payment of paving assessments to the City of Raleigh for paving which has been done in the past in and around State-owned property here.

It has always been considered by this office as necessary that an act of the General Assembly should expressly authorize the assessment of State-owned property or that such should follow by necessary implication; otherwise, property of the State is not subject to assessment. This seems to be in accord with the general rule in this country. See 44 C. J. 523 and the many cases cited thereof.

STATE CONTRACTS FOR CONSTRUCTION; FAILURE OF BIDDER TO COMPLY WITH
BID; RIGHT TO REBID AFTER FAILING TO COMPLY WITH
ORIGINAL BID; G. S. 143-129

31 December 1946

I received your letter of December 30, in which you write me as follows:

"On Tuesday, December 17, 1946, Mr. W. W. Pollock, Architect, and the writer talked with you, regarding the bids on terrazzo floors on the male and female epileptic buildings, which were opened on December 4, 1946.

"Carolina Marble and Tile Company, Winston-Salem, N. C., was considered the lowest and best bidder at \$12,269.00, and award was made accordingly. This firm has now refused to sign a contract and has forfeited their deposit, which was in the form of a certified check in the amount of \$613.45. This check was deposited by the institution on December 19, 1946, and evidently has been paid by the bank.

"We now plan to readvertise for bids on this work, and we will greatly appreciate it if you will advise us whether or not this firm could legally be refused an opportunity to bid again on this particular work or any future work for this institution. Your opinion in this matter will be greatly appreciated."

I am of the opinion that you would have a right to refuse to consider any bid which is made by the Carolina Marble and Tile Company on this work when bids are requested in your readvertisement. Inasmuch as the company has failed to live up to and comply with the bid which it has already made on this job, I am of the opinion that you would be within your rights in refusing to consider another bid which it would make, as the statute, G. S. 143-129, provides that the board or governing body shall make the award to the lowest responsible bidder, taking into consideration the quality and the time specified in the proposals for the performance of the contract. As this bidder has already shown that it is not responsible by failing to comply with its bid on this particular job, I feel that you would be thoroughly justified in refusing to consider another bid which it would make in that connection. The bidder, of course, could submit a bid and you would have no way to prevent him from doing so, but you would not be compelled to award the contract to him, for the reasons above stated, even if he was again the low bidder.

As to whether or not you would have a right to refuse to consider a bid made by this same bidder on some future work for your institution, it would depend upon circumstances then existing. If any bids on other work were requested in the immediate future under the same circumstances now existing with respect to this contractor, you would be justified in considering that it had demonstrated that it was not responsible for its bids and for this reason reject a low bid made by it. It is possible, of course, that the next time bids were invited, circumstances would be so changed, both as to the bidder and as to conditions under which the bids could be made, that you would not be justified in refusing a low bid by this contractor. I believe it would be better to wait to determine this question at the time it arises, if it does arise at some future date.

AGRICULTURE; FOOD; OLEOMARGARINE; COLORED OLEOMARGARINE;
SERVING IN DINING ROOMS OF STATE INSTITUTIONS

9 April 1947

In your letter of the 7th of April, 1947, you state that you are anxious to serve colored oleomargarine to patients in your institution because of its nutritional value and because it is more economical to serve this form of food than butter, and you inquire if it is permissible for you to purchase colored oleomargarine and be exempt from the payment of the Federal tax thereon.

G. S. 106-234 makes it unlawful to serve oleomargarine in any public dining room, restaurant, cafe, boarding house, or hotel as a food when such oleomargarine is of a yellow color in imitation or semblance of butter, or when it has a tint or shade containing more than one and six-tenths degrees of yellow, or of yellow and red collectively, but with an excess of yellow over red, as measured in terms of Levibond tintometer scale, or its equivalent. Under the provisions of this Act, the serving of colored oleomargarine is prohibited only in dining rooms, etc., which hold themselves out to the public generally as places at which food for immediate consumption may be purchased. It is not thought that the proscriptive provisions of the Act were intended to apply to boarding houses and dining rooms which serve only a select group and are not open to the public in a general sense. It is the opinion of this office that colored oleomargarine may be served to the patients in your institution since it is not a public dining room where food may be purchased.

With respect to your question as to whether or not you may buy oleomargarine free of the Federal tax, it is my impression that the tax levied by the Federal Government is against the manufacturer and vendor of such product and is not passed on to the purchaser. I am informed that the tax is rather prohibitive and that perhaps you may not be able to purchase oleomargarine in its colored form. It is not thought that the manufacturer or vendor of colored oleomargarine could exempt himself from the Federal tax for sales made to institutions such as yours.

INSANE PERSONS AND INCOMPETENTS; COMMITMENT TO STATE HOSPITAL,
HOSPITAL FOR THE INSANE

16 April 1947

In your letter of the 15th of April, 1947, you enclose a commitment in the case of STATE v. FRED POWERS. It appears from this judgment that the defendant entered a plea of guilty at the March, 1947, Term of Scotland County Superior Court to the crime of temporary larceny of an automobile and was sentenced to jail for a period of eighteen months, judgment suspended and the defendant placed on probation for a period of five years under the supervision of the North Carolina Probation Commission, subject to certain conditions of probation set out in the judgment.

A special condition was incorporated in the judgment to the effect that the defendant be committed to the State Hospital at Raleigh for a period of thirty days for care and treatment or for an indefinite period of such treatment as in the judgment of the hospital authorities might be neces-

sary. It was further ordered in the judgment that the Superintendent of the State Hospital at Raleigh should report to the Probation Commission the progress of the case and notify the said Commission before the defendant be released or discharged.

It is the opinion of this office that there is no statutory provision for the commitment of the defendant in this case to the State Hospital in the manner in which it occurred; and that should the defendant institute habeas corpus proceedings, that the Court before whom the proceedings was heard would be justified in releasing him from the hospital. It is thought, however, that should this defendant be released by you that it would be incumbent upon you to notify the Probation Commission here in Raleigh of your intended action before doing so in order to avoid any possible violation of the order of the Court in this case.

DOUBLE OFFICE HOLDING; BUSINESS MANAGER OF STATE HOSPITAL
AND CITY COUNCILMAN

26 April 1947

You are advised that the office of Business Manager of the State Hospital at Raleigh is not an office within the meaning of Article XIV, Section 7 of the Constitution, which prohibits double office holding, and that one person may hold that position and at the same time hold the office of a City Councilman of a municipality in this State.

TORTS; STATE EMPLOYEES; LIABILITY INSURANCE

29 May 1947

Replying to your letter of the 28th of May, 1947, you are advised that there is no provision under the law nor is there any appropriation made to any State agency or institution which provides for the purchasing of liability insurance on State-owned motor vehicles used by State employees. The drivers of such motor vehicles would be personally liable for any accident which might occur while driving such motor vehicles should they be in fault. The State is not liable for torts of its employees.

STATE HOSPITALS AND INSTITUTIONS; LEGAL SETTLEMENTS

4 November 1947

In your letter of the 3rd of November, 1947, you state that there is a patient in your institution who was sentenced from Jones County in November, 1936, to ten years at hard labor. While serving his term on the roads he developed tuberculosis and was transferred to the penal division of your institution where he still remains, having served out his time. You further state that this man was nineteen years of age at the time of his sentence and that shortly before he was sentenced to the roads, his father removed to Lenoir County. You inquire as to which county this man has a legal settlement and which county would be responsible for his care and treatment at your institution if it be determined that he is indigent.

From the above facts, it is seen that this man was a minor at the time his father removed from Jones to Lenoir County; and it would appear that this man acquired a settlement in Lenoir County under G. S. 153-159 which reads in part as follows:

"Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county, in the manner following, and not otherwise: . . .

"3. Legitimate children shall follow and have the settlement of their father, if he has any in the state, until they gain a settlement of their own; but if he has none, they shall, in like manner, follow and have the settlement of their mother, if she has any."

From the above, it appears that during this man's minority, his father removed from Jones to Lenoir County and there acquired a settlement; and it is the opinion of this office that this man, under the above statute, acquired the settlement of his father in Lenoir County upon his removal thereto.

PERMANENT IMPROVEMENTS ACT OF 1947; APPROPRIATIONS FOR NORTH
CAROLINA SANATORIUM, WESTERN NORTH CAROLINA SANATORIUM AND
EASTERN NORTH CAROLINA SANATORIUM; TRANSFER
OF APPROPRIATIONS, ETC.

18 November 1947

I received your letter of November 15, which I have read with a great deal of care.

I note your statement that the estimates of cost of architects for the construction of the various building projects authorized by the last General Assembly for the North Carolina Sanatorium, Western North Carolina Sanatorium and Eastern North Carolina Sanatorium will represent a minimum of 40% increase over the legislative appropriations, and that you find yourself in the position of not having sufficient money to provide the things intended by the General Assembly.

You state that you are wondering whether the Council of State would have the authority to authorize the transfer of funds from one project to another when it is apparent that the construction of all of the projects could not be completed within the appropriation.

I have examined the provisions of the Permanent Improvements Act, Chapter 662 of the Session Laws of 1947. Section 5 of this Act provides that the Director of the Budget is authorized and empowered to make transfers and changes between the appropriations made in this Act within the appropriations made to each agency, to provide changes to permit completion of projects as described in the appropriations.

The Governor and Council of State would not, in my opinion, have any authority with respect to this matter but apparently the Governor, as the Director of the Budget, would have the authority to authorize the transfer as set out in Section 5.

You are, of course, acquainted with the provisions of Section 8, which provides that the appropriations are not to be available for expenditure until the Governor and the Advisory Budget Commission shall have de-

terminated the time best suited, in their opinion, for the State to secure the greatest benefits for the expenditure of these appropriations, and shall have approved the date for starting these permanent improvement projects.

STATE PROPERTY FIRE INSURANCE FUND; STATE SANATORIUM; FIRE LOSS
OF PERSONAL PROPERTY BY EMPLOYEES

13 February 1948

I acknowledge receipt of your letter of February 10 in which you state that one of the institution's dormitories in which certain employees were housed was recently destroyed by fire. That the employees lost all of their clothing and other articles of personal property.

You inquire as to whether or not the State is liable for this loss on the part of the employees.

The State Property Fire Insurance Fund established by the 1945 Session of the Legislature covers state-owned buildings and certain equipment located therein but does not cover personal property of other persons including employees of the institution.

WORKMEN'S COMPENSATION ACT; LIABILITY OF CASWELL TRAINING SCHOOL
FOR INJURY TO EMPLOYEES WHO ENGAGED IN A FIGHT

12 May 1948

In your letter of the 11th of May, 1948, you state that a few days ago a fight occurred between two attendants at your institution, both of whom were on duty at the time; and the fight occurred between the two men as a result of a disagreement due to personal dislikes. You further state that as a result of this fight, one of the attendants was severely injured; and you inquire if there is any liability on the part of your institution for the payment of hospital and medical expenses incurred by this employee.

In order for any liability on the part of your institution to be incurred, there must be an accident arising out of and in the course of the employment of an employee of your institution. From the facts stated above, it is the opinion of this office that this injury did not arise out of the employment of the injured person; and, therefore, there is no liability on the part of the Caswell Training School for the payment of hospital and medical expenses incurred by him.

PREVENTION OF SPREAD OF TUBERCULOSIS

24 May 1948

In your letter of the 22nd of May, 1948, you state as follows:

"As you are probably aware, this institution has a prison division to which health offenders are sent by a court order. As a rule, the order says from 2 to 6 months, and then adds 'or at the discretion of the Medical Superintendent'.

"The Sanatorium would like to have a ruling from you, if you please, on whether that sort of sentence enables or entitles the Sanatorium to keep a person for the duration of his tuberculosis, or whether he must be discharged at the end of his six months maximal sentence. I will appreciate hearing from you. Thank you."

G. S. 130-225.1 provides in part that any person having tuberculosis in the communicable form who, after being instructed by an agent of the county or city board of health as to precautions necessary to be taken to protect the members of such person's household or the community from becoming infected by tuberculosis communicated by such person, shall wilfully refuse to follow such instruction shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the prison department of the North Carolina Sanatorium. This section also provides that for the first offense the term of imprisonment shall be from two to six months, to be determined by the Superintendent of the Sanatorium as to those confined there.

When the order reads as indicated in the first paragraph of your letter, it is the opinion of this office that for a first offense you have no authority to hold this man longer than six months. You may, in your discretion, discharge such person at any time after the expiration of two months under such an order. It is only upon the conviction of a second offense that such person may be sentenced for an indeterminate period.

OPINIONS TO TEACHERS COLLEGES

EDUCATIONAL INSTITUTIONS; WESTERN CAROLINA TEACHERS COLLEGE;
AUTHORITY TO ADOPT SUPPLEMENTARY ENTRANCE REQUIREMENTS
DIFFERENT FROM ENTRANCE REQUIREMENTS STATED IN
PRINTED CATALOG

16 July 1946

You have sent to this office a catalog of Western Carolina Teachers College for the year 1946-1947, and also a written statement of recommendations made by a special committee organized for the purpose of considering college admission policies. You ask us to consider the catalog and the proposed amendments to the catalog affecting entrance requirements and then to advise you on certain questions as follows:

1. Is a faculty within its rights in adopting and putting into execution supplementary entrance requirements which are in certain respects essentially different from entrance requirements as printed in the catalog?
2. Would approval by the Board of Trustees be sufficient to validate these new entrance requirements, although the catalog entrance requirements do not square with the new regulations?
3. Assuming that the new regulations are approved by the Board of Trustees, would the simple expedient of furnishing new students with a copy of the new regulations be sufficient to meet legal requirements?

The duties of the Trustees of Western Carolina Teachers College are set forth in Section 116-49 of the General Statutes of North Carolina. Aside from the duty of providing for buildings, physical plant and maintenance, the Trustees "may do all things deemed useful and wise by them for the good of the school." Under Section 116-52, the President of the College is the Secretary of the Board of Trustees and under Section 116-47, the President makes recommendations to the Board of Trustees when they are in session for the transaction of business.

I am of the opinion, therefore, that a faculty can adopt and put into effect entrance requirements which are in certain respects essentially different from entrance requirements printed in the catalog. I am assuming that the President of the College will do this upon administrative order and I am further of the opinion that the Board of Trustees can validate these new entrance requirements although the catalog entrance requirements are not consistent with the new regulations. I further think that the new regulations approved by the Board of Trustees, would be valid and binding upon any prospective students or new students upon furnishing him or her with a copy of the new regulations or requirements. I do not, however, give these new regulations or new entrance requirements a retroactive application. If a student has already entered the College under the entrance requirements stated in the catalog, then I don't think he ought to be excluded by new regulations placed in force after he entered the College, and begins his course upon the basis of requirements stated in the catalog.

VETERANS, WORLD WAR II; G. I. BILL OF RIGHTS; WAR BONUS

10 October 1946

In your letter of the 8th of October, 1946, you state that Mr. Eugene E. Garbee, one of your teachers, returned from active duty in the armed forces last October, and taught through the term of school ending in May of this year. You also state that Mr. Garbee after the close of school went away during the summer months of this year and made \$1300 in a boys' camp, and that during this time he drew his salary from your college, it being your custom and practice to pay salaries to teachers on a twelve months' basis. You also state that during the time he was away in the service his family lived in a teacher's home belonging to the college, and that during this time his wife worked for the college and fixed her own hours and her own salary.

Enclosed in your letter is a joint statement signed by you and Mr. Garbee in which it appears that when Mr. Garbee left for his tour of active duty in the armed forces he was paid in full up to that date; that he returned to the college on October 15, 1945, and resumed his duties; that the school closed on the 10th of May. It also appears from this statement that at a conference in your office at the close of the school term you estimated that he had taught seven and one-half months, and that his salary, including his bonus, was \$3,120 for which he was to teach nine months, which amounted to \$347 per month or \$2,603. It further appears from this statement that the college has paid him \$2,530 leaving a balance of \$73.00, and that the college now proposes to pay this balance to Mr. Garbee. Mr. Garbee's contention appears to be that the school year runs from September to June and that his salary is earned during this time, but since the college has paid him, as is customary, his salary in twelve monthly installments on or about the first of each month, that the college owes him for this year the August installment on his salary.

From the information gathered on your recent visit to this office it appears that the college actually paid Mr. Garbee the July, 1946, installment on his salary.

Under the facts outlined above you ask the following questions:

"1. Is it proper for the college to pay money in 1946-1947 for work done in 1945-46?

"2. Does the G. I. Bill of Rights apply to state institutions?

"3. Is it compulsory to pay returning veterans increases in salaries made to others during the absence of such veterans?"

The fact that Mr. Garbee secured other employment during the summer months and at a time when school was not in session, and the fact that his wife during his absence in the service lived at a teacher's home belonging to the college and worked for the college does not, in my opinion, have any bearing on the subject at hand.

Answering your first question it is my opinion that Mr. Garbee is only entitled to the sum of \$347.00 per month for the seven and one-half months which he actually taught, or \$2,603. The college having already paid him \$2,530 of this amount it is the opinion of this office that he is entitled to only the difference between these two figures which amounts to \$73.00.

Answering your second question you are advised that the G. I. Bill of Rights does not apply to state institutions, although it has been the policy of most state institutions to give returning veterans every consideration and to extend to them every consideration with respect to any seniority rights and increases in salary which they may have received had they not gone into the service.

Replying to your third question you are advised that there is no law which would have the effect of requiring state institutions to pay veterans increases in salaries made to others who held like positions to theirs during the absence of such veterans in the armed forces. It has been the custom, however, and the policy for all institutions, I am advised by the Budget Bureau, to extend to such returning veterans all increments in salaries which they would have been entitled to had they not entered the armed forces.

STATE INSTITUTIONS; TUITION

5 March 1947

I have your letter of March 3 and beg to advise that, in my opinion, East Carolina Teachers College has, under the law of the State, the legal right to charge tuition for veterans who are residents of North Carolina, which is paid by the Veterans' Administration, on the basis of the charges made for out-of-State tuition. Charges on the basis of out-of-State tuition are being made by all State institutions to the Veterans' Administration for students attending State institutions under the Veterans' Administration program.

EMINENT DOMAIN; RIGHT OF EAST CAROLINA TEACHERS COLLEGE TO CONDEMN PROPERTY

4 February 1948

I have your letter of January 27, in which you inquire as to whether or not your institution would have a right to condemn land needed for the enlargement of your campus.

G. S. 40-2, subsection 7, authorizes any educational institution incorporated or chartered by the State in need of lands for its location or in need of adjacent land for necessary enlargement or extension, and for other purposes, to condemn such property by following the procedure set out in Chapter 40 of the General Statutes. This authority would extend to land, the title to which was held subject to a life estate with the remainder over to other people. The character of title to the property would have nothing to do with the right to condemn.

WESTERN CAROLINA TEACHERS COLLEGE; INVESTMENT OF ENDOWMENT FUND

4 June 1948

I have your letter of June 2, in which you state that at your annual Board meeting of the College on June 1, the Board unanimously approved a plan to invest your Student Loan Fund in a duplex apartment building, subject to favorable interpretation of the legality of this procedure from this office.

You state that the Loan Fund has been accumulated through various sources, including gifts from faculty members, alumni and friends, and that a portion of it came from unused receipts from your hydro-electric plant. You state that the Fund is not in the hands of any special board of trustees but is handled, so far as loans are concerned, by a special committee appointed by the President. Your question is whether or not the Board would have the legal authority to invest these funds in such a building, leaving a surplus for any loans that might be in demand by any students.

The law with reference to the endowment fund of your institution, which I find in General Statutes 116-55, provides as follows:

"The board of trustees are hereby authorized to establish a permanent endowment fund, to be loaned to needy and worthy students. The board may receive gifts and donations, and may, after furnishing lights and power to the normal school, sell excess current, if any there shall be, at a rate approved by the Utilities Commission, to the people in the community, and set aside for said endowment any moneys coming to the institution from such sources. The Board of Trustees are hereby empowered to make rules and regulations for the proper safeguarding and loaning of said funds."

You will observe that the statute provides that the Board of Trustees are authorized to make rules and regulations for the proper safeguarding and loaning of the funds. If the amount invested in the proposed duplex apartment building would leave on hand ample funds with which to meet any expected requests for loans to students, I believe the Board would have the power to invest the money in the apartment building, as I would assume that the building would be rental property from which income would be produced, which would further increase the available funds for loans. The Board would doubtless have authority to invest the endowment fund in interest bearing securities or in rental property, if sufficient available funds were kept for making such loans as might be requested and found to be proper.

I conferred with Mr. Deyton about this matter over the telephone and he agrees with this conclusion.

You also inquired as to whether or not the building, if constructed, could be done without letting the contract in compliance with the statute, G. S. 143-129.

It is my opinion that you would have to comply with the requirements of this section, as the funds would be expended by the Board of Trustees of your institution as public funds.

EDUCATIONAL INSTITUTIONS; EMINENT DOMAIN; NECESSITY OF TAKING
PROPERTY; DISCRETION OF BOARD OR AUTHORITY VESTED WITH
POWER OF EMINENT DOMAIN

23 June 1948

You state that there is a piece of land adjoining the campus of East Carolina Teachers College which you would like to condemn and acquire for college purposes. You further state that this is a jib-shaped piece of

land, it fits into the campus, borders on Tenth Street and is needed to square out the campus. If it is not now acquired, it will apparently soon be sold for building lots, and your right to acquire it would then possibly be lost. In your opinion, the price which is now asked for the property is exorbitant.

You would like to know if you could condemn this property since it fits into the natural scope and environment of the campus and since it is also needed for a trailer camp site for the married veterans.

Subsection 4 of Section 40-2 of the General Statutes, dealing with eminent domain, permits public institutions of the State to condemn property for the purpose of providing water supplies, or for other necessary purposes of such institutions. It is also provided in subsection 7 of Section 40-2 of the General Statutes as follows:

"Any educational, penal, hospital or other institution incorporated or chartered by the State of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the state for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary to the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter."

It seems to me that your necessity for this land is present and immediate, and the fact that it would be put to certain uses of a public nature connected with the college at a future date after the condemnation would not designate its use as merely prospective. Nearly all developments, where land is acquired by eminent domain in that sense, are prospective in nature and look to the future; but this does not prevent the need or necessity for the land from being immediate. In the case of *YARBOROUGH v. PARK COMMISSION*, 196 N. C. 284, 292, it is said:

"One class of cases defining a public use includes those in which the United States, a State, or a municipal corporation seeks to acquire land on which to carry on its proper public functions or to perform some act directly enhancing the security or health of the community. *Nichols, The Power of Eminent Domain*, section 211. In accordance with these principles the power of eminent domain has been exercised by taking private property for highways, railways, streets, playgrounds, memorial halls, monuments, statues, public buildings and many other similar purposes. *Those which are primarily aesthetic are not excluded.* The old doctrine that land could be taken only when needed by the public for necessary purposes is now little more than a theory or a canon of construction. In *SHOEMAKER v. UNITED STATES*, 147 U. S., 282, 297, 37 Law Ed., 170, 184, it is said that a proposition to take private property, without the consent of the owner, for a public park would formerly have been regarded as a novel exercise of legislative power, but now the validity of legislative acts erecting such parks and providing for their cost is uniformly upheld." (*Italics ours.*)

Furthermore, it is held in the above cited case that where the use contemplated is a public use, the extent to which property shall be taken for such use rests in the discretion of the authority or body vested with the power of eminent domain.

In the case of *LUTHER v. COMMISSIONERS*, 164 N. C. 241, 244, the Supreme Court of North Carolina quotes from 2 Lewis Eminent Domain, Section 66, as follows:

“All questions relating to the exercise of the eminent domain power and which are political in their nature and rest in the exclusive control and discretion of the Legislature may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made or the particular property taken are questions of this character, and the owner is not entitled to a hearing thereon as a matter of right.”

In the case of *JEFFRESS v. GREENVILLE*, 154 N. C. 490, in discussing the discretion vested in a board or municipal body having the power of eminent domain, the Court said:

“The plaintiff further contends that the public interest does not demand that the street be widened and the trees destroyed, as ordered by the board. Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the public welfare. 1 Lewis Em. Dom., Sec. 1. Being an essential attribute of sovereignty, it is exercised by the people through the Legislature, to which it has been delegated. The time and manner of its exercise must, from its very nature, be left to the discretion and wisdom of that body. When conferred upon some subordinate municipal body, the same discretion necessarily resides in it.”

It would seem, therefore, that the necessity of the taking, the amount of property needed and the purposes to which it shall be devoted are largely questions in the discretion of your Board of Trustees; and in the absence of an abuse of discretion, a decision of your Board of Trustees on the question of necessity, immediate need, etc., would be final, assuming that the property is used for some genuine purpose. The land owner can only contest, and his only interest is, for condemnation.

I would suggest, therefore, that if you wish to condemn this property, your Board pass a proper resolution containing the necessary recitals as to the immediate need of the property and its use for college purposes and instructing the proper administrative officials to proceed with the necessary steps to institute condemnation proceedings.

MISCELLANEOUS OPINIONS

INCOME TAXATION; SOLICITATION OF CONTRIBUTIONS; CHARITABLE ORGANIZATIONS

20 August 1946

You have submitted to me for examination a copy of the Certificate of Incorporation of STATE COMMITTEE FOR TRAFFIC SAFETY, INC., with the request that I advise you whether or not contributions made to this corporation by individuals and other corporations would be deductible for income tax purposes. It is the desire of the corporation to solicit contributions in support of its program on the basis that such contributions would be deductible.

Article IV of the Certificate of Incorporation provides as follows:

"The objects and purposes for which this corporation is formed are to sponsor and carry on a program of activities in the State of North Carolina designed to reduce traffic accidents on the streets and highways of the State by cooperating with the National, State, county, and municipal governments and civic organizations, and by sponsoring an educational program through the State public schools and educational institutions of the State, by teaching traffic safety programs so as to give adequate day by day instructions on the immediate needs in accident prevention, by using all modern scientific techniques in the use of dramatizations, maps, films, etc., and in general, to provide a broader education and training as an integral part of the curriculum for students approaching legal driving age, and for all age levels; and where possible to provide driver education and training as a summer school service and night sessions for the training of adults in the community; and to conduct training schools throughout the State for traffic court judges, solicitors, and enforcement officers to acquaint them with the latest available technique in accident prevention and as a medium through which such officers can discuss and solve traffic and accident problems arising in their particular community."

Article VI of the Certificate of Incorporation provides that the corporation shall be a non-profit corporation and shall have no capital stock.

Article VII of the Certificate of Incorporation provides for management by a Board of Governors, of which the Governor of North Carolina shall be ex-officio chairman, and of which the Commissioner of Motor Vehicles, Chairman of the State Highway and Public Works Commission, and the Superintendent of Public Instruction shall be ex-officio members.

Article X provides that no officer or member of the Board of Governors shall receive any compensation, or receive any dividend, or have any right, title or interest in the corporate assets upon dissolution, but that upon dissolution all assets shall escheat to the State of North Carolina to be used by the public schools under the supervision of the Superintendent of Public Instruction to continue the teaching of subjects and sponsoring of programs designed to reduce traffic accidents on the streets and highways of the State.

It is my opinion that contributions to this corporation will constitute contributions to a corporation organized and operated exclusively for charitable or educational purposes within the meaning of Section 322(9) of the Revenue Act, and that such contributions, therefore, will be deductible for income tax purposes when made by individuals, firms, partnerships and corporations.

The word "charity" in law has a broad and comprehensive meaning. It has been defined as "a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." 10 *Am. Jur., Charities*, Section 3.

"Charity in the legal sense is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification which embraces the improvement and promotion of the happiness of man. The element of indefiniteness in the recipients of a bounty is, of course, essential to the character of a public charity." 10 *Am. Jur., Charities*, Section 136.

A charitable corporation is "one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class from a part of it indefinite as to number of individuals." *Black's Law Dictionary*, 3rd Ed., page 312.

"In its legal sense the word (charity) includes not only gifts for the benefit of the poor, but endowments for the advancement of learning or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose . . . the term includes substantially any scheme to better the conditions of any considerable part of society, and includes any gift not inconsistent with the law which tends to promote science or the education, enlightenment, or the amelioration of the conditions of mankind, or which is for the public convenience . . . 'charity' is a gift to a general public use which may extend to the rich as well as to the poor." *Black's Law Dictionary*, 3rd Ed., page 313.

The instant corporation appears to be organized for a public and worthy purpose, and its benefits extend to an indefinite number of persons, i.e., the general public. In my opinion, its purposes are exclusively charitable, and contributions to it are deductible for State income tax purposes.

STATE PLANNING BOARD; COUNTY PLANNING BOARD; JOINT COUNTY AND CITY PLANNING BOARDS; NUMBER OF MEMBERS; POWERS AND DUTIES

27 August 1946

In your letter of August 20, 1946, you ask several questions in regard to county planning boards and joint county and city planning boards which questions are enumerated in three divisions. I assume that you have a copy of your letter; and, therefore, for the purposes of this opinion, I will not quote each question.

In your questions under Part I you ask if the county commissioners are authorized to enter into agreements with several or all of the cities and towns within the same county in establishing a joint planning board.

The answer is that Chapter 1040 of the Session Laws of 1945 authorizes the county commissioners to enter into any agreements with any other county, city or town for the establishment of a joint planning board. The same chapter likewise authorizes the governing body of any city or town to enter into such agreements with any other city, town or county for the establishment of a joint planning board. Certain counties are exempted from the provisions of the Act.

In your question (a) under Part I you ask if there is any restriction as to the share of the expenses of the operation of a joint planning board which must be borne by each unit; you further ask if each participating unit must bear some part of the expenses. Chapter 1040 of the Session Laws of 1945 does not within itself place any restriction on the expenditure of funds for this purpose, and there is no statutory determination as to the share of the expenses of operation which must be borne by any particular unit participating in a joint planning board. There is no statutory mandate to the effect that each participating unit must bear some part of the expenses. To my mind, this is a matter of agreement between the participating units of the joint planning board. There are, however, general and over-all restrictions on the expenditures of all county and municipal funds. The expenditures contemplated in Chapter 1040 of the Session Laws of 1945 on the part of counties and municipalities for joint planning board purposes must conform to all the constitutional and statutory requirements dealing with the financial affairs of counties, cities, and towns. The chapter in question does not authorize any special tax levy for planning board purposes nor do we have any legislative declaration or any opinion of the Supreme Court that joint planning board expenses are to be considered as necessary expenses. It would seem, therefore, that counties may consider an expenditure as an expenditure for a public purpose and must, therefore, set up this object or purpose in its regular county budget; and any monies appropriated for this object must fall within the regular fifteen cents levy by which method the counties accumulate their various general funds. If a county has unappropriated surplus funds, then these funds could be used for this purpose. The same general source of funds for planning board purposes is likewise applicable to cities and towns. I think that cities and towns must provide their joint planning board funds from their levy for general purposes or they may use surplus funds not otherwise needed. I do not find any authority for cities and towns to make any special tax levy for planning board purposes.

In your question (b) under Part I you ask if joint planning boards may be composed of more than five members. The statute is silent on this point but authorizes "any agreements" for the establishment of such boards. I think, therefore, the joint boards may be composed of more than five members. A county planning board, when operating by itself, provides that not less than three nor more than five persons shall be appointed on such board. You will note that a county planning board does not enter into these agreements but that the county commissioners and the governing authorities of cities and towns enter into these agreements.

In your question (c) under Part I you ask if all members and all changes in membership of joint planning boards must be approved by all participating units or if the selections can be governed by the agreement. In my opinion, this is a matter to be governed by the agreement. Of course,

the agreement may provide that all members and changes in membership shall be approved by each of the participating units; but it seems to me that it was contemplated that all of these things should be embodied in the joint planning board agreement.

I now consider the questions presented under Part II of your letter. As a preface to your questions, you assume a voluntary community planning council, operating in a county, community or area and composed of representative delegates from county or municipal governments and from public departments or agencies (including farm agents) and also delegates from privately financed agencies as well as civic, fraternal, patriotic, and religious associations and groups. Assuming the organization of such a voluntary council, you ask as question (a) under Part II if statutory planning boards, municipalities, counties, public departments or agencies, school boards, and any other public or quasi-public governmental unit may become members of such a voluntary community planning council which has no statutory basis of organization. I do not know of any statute that expressly authorizes such governmental or quasi-governmental units to become members of such a voluntary planning council. Likewise, I do not know of any statute that prohibits such a membership. Upon the assumption that membership in such council will result in benefit and perhaps the performance of service to the membership unit, I am of the opinion that municipalities, counties and other governmental units described in your question (a) may participate in and become members of such a voluntary community planning council provided always that such governmental units do not attempt to delegate any of their governmental functions or duties to such community planning council and provided always that such participating governmental units do not attempt to restrict and do not restrict the exercise of any governmental power and discretion which such units are required to exercise according to law.

Your question (b) under Part II is really composed of four questions relating primarily to the expenditure of funds. In essence you ask that if one of the governmental units described in question (a) under Part II joins such a community planning council, may these units or either of them pay membership fees to such a council or make contributions of funds, office space, or service to such a council or may they pay for services such as that of a survey made by or through such a council or may they co-operate with such a council in jointly employing staff for research and planning. I do not know of any General Statutes or law that authorizes the expenditure of funds contemplated by these questions or the furnishing of such office space and service as well as surveys. It is fundamental that governmental units must have statutory authority for the appropriation and expenditure of funds; and such funds must be spent for public purposes. I am compelled, therefore, to answer all four subdivisions of question (b) in the negative. It is hard to see how there would exist legal authority for the payment of these funds and furnishing of these services to a voluntary private organization when all of these objectives can be achieved through public statutory planning boards.

In your question (c) under Part II you ask if planning boards may call into being such councils as advisory to the planning boards. I see no reason why planning boards cannot set up advisory councils composed of

persons who have knowledge and experience along these lines. In fact I see no reason why a planning board cannot seek advice from any legitimate source. I seriously doubt if such councils would have any official standing, and I also seriously doubt if planning boards could officially delegate to such councils any authority.

In your question (d) under Part II you ask under what circumstances may expenses of an advisory council be paid by the planning board. I am of the opinion that under no circumstances would the planning board be authorized to pay any expenses of an advisory council. I refer, of course, to the membership expense itself and not to the employment of an individual or specific group of individuals to make surveys or perform specific services.

I consider now your questions under Part III. In this question you ask if the answers given to questions under Part II with respect to community planning councils apply equally to local chambers of commerce. I am of the opinion that the answers given to the questions enumerated under Part II do apply equally to local chambers of commerce.

In Part IV you ask if the answers given to questions in Part II and Part III apply equally where such community planning councils or chambers of commerce were incorporated or not incorporated. My answer is that the answers under Part II and Part III apply equally to corporated and unincorporated organizations and councils.

In question V you ask if county, municipal and joint planning boards can accept contributions from private agencies, organizations and individuals. I know of no law that prohibits such units from accepting contributions from private agencies; and I am of the opinion that such contributions can be accepted.

In your question designated as Part VI you ask if a planning board and a Community Chest covering the same area can cooperate in jointly financing a community planning program. You further ask if either can contribute to the other for this purpose or if either one can contribute to a council or to a foundation supporting the work of a council. I am of the opinion that a planning board and a Community Chest cannot cooperate in a jointly financed community planning program. There is no statutory authority for such cooperation. The planning board cannot contribute to the Community Chest for this purpose; but as stated in my answer to question V, the Community Chest could contribute to the planning board.

In the last question of Part VI, I am of the opinion that a planning board cannot contribute to a council or to a foundation supporting the work of a council. There is no statutory authority for such a contribution on the part of the planning board. Of course, the Community Chest is governed by its own rules as to its individual contributions.

In closing, I call attention to the statutory authority of city planning boards contained in Section 160-22 of the General Statutes and sections following because Section 160-24 expressly authorizes the governing bodies of cities and towns to appropriate funds to local planning boards and the Act of 1945 simply allowed counties and cities and towns to act and make expenditures jointly which theretofore they could only make individually as individual units.

A. & T. COLLEGE; RESIDENTS; GRADUATE COURSES; PARTICIPATION BY STATE
IN EXPENSES OF STUDENTS FOR ATTENDING OUT-OF-STATE COLLEGES

15 October 1946

Receipt is acknowledged of your letter of the 14th of October, 1946, wherein you inquire as to what constitutes a bona fide citizen to qualify a student who desires to receive State aid to provide instruction in one of the professions which is not available in any of the State institutions of this State for negro students.

Of course, the aid contemplated by the statute to such students applies to bona fide residents of this State, and in order to determine whether or not such a student is a bona fide resident of the State so as to enable him to receive the benefits of State aid, it is necessary to, as far as possible, determine from various court decisions which have defined the term "residence."

In many cases it is necessary to determine the residence of the parents of such student, as the residence of a minor is that of his parents or guardian unless such minor has been emancipated to the extent sanctioned by the decisions of our Supreme Court. In determining the residence of a particular parent, all available facts must be taken into consideration. The Supreme Court of North Carolina and the courts of other jurisdictions have defined the term "residence" in numerous cases.

In the case of *WATSON v. RAILROAD*, 152 N. C., 215, 216, the court said:

"The word 'residence' has, like the word 'fixtures,' different shades of meaning in the statutes (*Overman v. Sasser*, 107 N. C., 432), and even in the Constitution, according to its purpose and the context."

In the same case, at page 217, the court continuing its discussion on the meaning of the word "residence," said:

"Probably the clearest definition is that in *Barney v. Oelrichs*, 138 U. S., 529: 'Residence is dwelling in a place for some continuance of time, and is not synonymous with domicile, but means a fixed and permanent abode or dwelling as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident,' there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes.' To same effect *Coleman v. Territory*, 5 Okl., 201: 'Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. 'Residence' indicates the place where a man has his fixed and permanent abode, and to which, whenever he is absent, he has the intention of returning.' In *Wright v. Genessee*, 117 Michigan, 244, it is said: 'Residence means the place where one resides; an abode, a dwelling or habitation. Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining.' And in *Silvey v. Lindsay*, 42 Hun. (N. Y.), 120: 'A place of residence in the common-law acceptance of the term means a fixed and permanent abode, a dwelling-place for the time being, as contradistinguished from a mere temporary local residence.'"

In the case of *WRIGHT v. GENESSE*, 117 Michigan, 244, the court, citing the case of *WATSON v. RAILROAD*, *supra*, said:

"Residence means the place where one resides; an abode, a dwelling or habitation. Residence is made up of *fact* and *intention*. There must be the fact of abode and the intention of remaining."

In the case of *BRANN v. HANES*, 194 N. C., 571, at 577, the court, in discussing the meaning of residence, said:

"All the authorities sustain the following statement of the law: Actually ceasing to dwell within a state for an uncertain period without definite intention as to any fixed time of returning constitutes non-residence, even though there be a general intention to return at some future time."

The case of *WATSON v. RAILROAD*, *supra*, was cited with approval in the case of *HOWARD v. COACH COMPANY*, 212 N. C., 201, 202.

In the case of *DISCOUNT CORPORATION v. RADECKY*, 205 N. C., 163, the court, in discussing the meaning of the word "residence," said:

"The term 'residence' has no fixed meaning which is applicable to all cases, its definition in a particular case depending upon the connection in which it is used and the nature of the subject to which it pertains."

From the above discussion it is clearly seen that whether or not a person is a bona fide resident of this State depends largely upon a mixed question of fact and intent on the part of the person concerned.

In the final analysis, the question of residence is one of fact which must be determined by the authorities of your Institution in each particular case. If, after weighing all the facts and circumstances presented to you, you are of the opinion that such person is a bona fide resident of the State of North Carolina then such person, having applied for out-of-State aid in further pursuing his education and otherwise qualifying for such aid, would be entitled to the benefits of the law in this respect.

PROPERTY OF A. & T. COLLEGE ARMY CAMP

1 November 1946

Replying to your letter of the 16th of October, 1946, you are advised that we have approved the Abstract of Title to the Twenty-seven (27) tracts or parcels of land in Blocks U and T of the Summit Avenue Building Company Subdivision, subject, of course, to the two encumbrances mentioned in your certificate, neither of which are considered serious.

With respect to the 44.94 acres, your attention is invited to Exception 2. It is suggested that affidavits of possession of the present owners and their predecessors in title be obtained and included in the Abstract.

Your attention is further invited to Exception 3 in your certificate. It is suggested that affidavits of possession of the present owners and their predecessors in title be obtained and included in the Abstract. In this connection your attention is invited to G. S. 1-47(4), and to the case of

CREWS v. CREWS, 192 N. C. 679, which construes this statute. It is thought that under this decision, and the decisions there cited, that affidavits of the actual possession by the mortgagee are necessary.

Of course, Exceptions 6 and 7 in the certificate are to be taken care of before the final closing out of this transaction.

Subject to the above suggestions, the Abstract of Title to the 44.94 acres of land is approved.

With respect to the last paragraph of your letter of the 16th of October, it is suggested that under G. S. 136-96 that Mr. Clendenin will be the proper person to withdraw the dedication of the streets in accordance with this statute.

OUT-OF-STATE AID; GRADUATE STUDENTS RECEIVING BENEFITS OF
G. I. BILL OF RIGHTS; TRAVEL

5 June 1947

I have your letter of June 4, in which you state that you are receiving applications for out-of-State aid to veterans who are receiving benefits under the G. I. Bill of Rights. You state that your Committee has ruled that you could not pay tuition twice, which is recognized by the veterans, but that you would like to be advised whether or not you should extend any aid for out-of-State tuition, either in travel or tuition to those who come under the G. I. Bill of Rights.

I fully agree with the Committee that under the statute, G. S. 116-100 and the laws involved, there would be no occasion to pay any part of the tuition of the out-of-State student which was provided for him by the Federal Government under the G. I. Bill of Rights. The statute provides that we may pay tuition and other expenses for a student at a recognized college in such amount as may be deemed reasonably necessary to compensate the resident student for the additional expense of attending a graduate or professional school outside of North Carolina.

I have talked with Mr. Deyton about travel expenses and he states that it is his understanding that students should be allowed the difference between the cost of travel to the North Carolina institution and the institution out of the State to which they go for this purpose. It is his understanding that this difference in travel expenses is allowed for one trip each academic year. I believe you would be safe in proceeding upon this idea that the students should be allowed this difference in transportation costs.

SENATE BILL No. 353; GORDON GRAY ACT

30 June 1947

In your letter of the 24th of June, 1947, you state that the organization of which you are Executive Secretary was organized "to initiate and foster movements for social betterment in North Carolina and to coordinate the activities of lay citizens, social workers, and public officials in that direction." You further state that your organization biennially adopts a legislative program which is entered largely through the State Legislative Council of which your organization is one of the sixteen member agencies.

You inquire if your organization, under these facts, would be required to register with the Secretary of State as required by Senate Bill No. 353 adopted at the last session of the General Assembly.

Section 1 of the above Act is as follows:

"Section 1. Every person, firm, corporation, association, or organization, whether by or through its agents, servants, employees or officers, who or which is principally engaged in the activity or business of influencing public opinion and/or legislation in this State shall, prior to engaging in such activity or business, cause his, her, or its name to be entered upon a docket in the office of the Secretary of State of North Carolina, as hereinafter provided."

It is thought that the language quoted above is sufficiently broad to cover the activities carried on by your organization and that you should register with the Secretary of State as required by the Act.

STATE BOARD OF EMBALMERS; G. S. 90-207

28 October 1947

A conference was held this morning in this office with the following named members of the State Board of Embalmers:

H. W. Mims, President
J. D. Creech, Vice-President
W. M. Shepherd, Board Member
John K. Ward, Board Member

Also present at this conference were Mr. William Hunt, of Greensboro, North Carolina, and Mr. W. Ernest Thompson, of Burlington, North Carolina, Secretary and Treasurer of the State Burial Association Commission.

The object of this conference was to examine the law creating the State Board and to determine whether or not recommendations should be made to the Commission created by the 1947 General Assembly for the purpose of studying and investigating the various State examining boards of the State, to make certain changes in the Act creating the State Board of Embalmers.

Investigation discloses that this Board was created by Chapter 338 of the Public Laws of 1901 and only minor changes have been made therein since that time, one in 1917, Chapter 36, another in 1919, Chapter 88, another in 1931, Chapter 174, and still another in 1945, Chapter 98.

Particular attention was given to the provisions of G. S. 90-207 which deals with the grant and renewal of licenses and prescribes the fees to be paid therefor. Examination of this Section discloses that it is very vague in its terms and contains largely the language which was used in the original enactment of the Act in 1901.

In the interest of clarity, it is suggested that recommendations be made to the Commission established by the 1947 General Assembly referred to above, that this Section be rewritten in its entirety, embodying therein more specifically the terms and conditions and the powers and the duties of the Board with respect to the creating and renewal of licenses for the practice of embalming.

LICENSING BOARD FOR CONTRACTORS; DIVISION OF PURCHASE AND CONTRACT;
PURCHASE OF EQUIPMENT AND SUPPLIES

31 October 1947

In your letter of the 28th of October, 1947, you inquire if under the provisions of Chapter 87 of the General Statutes your Board has authority to purchase an automobile or other property through the Division of Purchase and Contract.

G. S. 143-49 sets forth the powers and duties of the Director of the Division of Purchase and Contract. Among these powers, it is provided that he shall purchase supplies, materials and equipment for the use of the State Government for any of its departments, institutions or agencies.

G. S. 87-2 sets up the State Licensing Board for Contractors; and as pointed out by you in your letter, G. S. 87-7 provides that any surplus remaining in the treasury of the Board after expenses have been paid for the current year are to be paid over to the Greater University of North Carolina.

This Board consists of five members who serve for definite terms of office and are required by the Act to take an oath of office.

It would appear from the above that the State Licensing Board for Contractors is a State Agency and is, therefore, entitled to purchase supplies, materials and equipment through the Division of Purchase and Contract.

STATE CORRECTIONAL INSTITUTIONS; JUVENILE COURTS; JURISDICTION;
DISCHARGE FROM STATE INSTITUTIONS; KENNETH NEAL

4 November 1947

In your letter of the 3rd of November, 1947, you state that the above-named boy was committed by you to the Eastern Carolina Industrial Training School for Boys, after having assumed jurisdiction over him some time ago upon charges of delinquency. You enclose in your letter a copy of a statement of the mother of this boy, a woman who has a police record, to the effect that she desired his discharge. Also enclosed in your letter is a case history of this boy showing various delinquencies, including larceny and absence from school, along with a copy of a dishonorable discharge from the training school by the Superintendent, which discharge is based upon non-cooperation of the mother and the incorrigibility of the boy. You state that your Court is still responsible for this boy and you inquire just what may be done in his case.

G. S. 110-21 provides, among other things, that when a Juvenile Court has obtained jurisdiction in the case of any child, unless a Court order shall be issued to the contrary, or *unless the child be committed to an institution supported and controlled by the State*, it shall continue for the purposes of the article during the minority of the child.

Under the facts in this case, it appears that you have heretofore committed this child to a State institution. Your jurisdiction therefor is, under the language of the statute above referred to, terminated as to this particular boy, and it attaches no more until some new petition is made to it, or until it assumes jurisdiction in any entirely new proceeding.

Of course, a new proceeding could be instituted to bring this boy again within the jurisdiction of your Court to be dealt with as you deem appropriate under the facts which may be presented to you. The fact that the Superintendent of the training school, in the so-called dishonorable discharge of this boy, makes the statement that "he cannot enter any correctional institution in North Carolina," would not preclude you from again committing this boy to such a correctional institution.

It is not thought that the non-cooperation of the mother of this boy has any bearing on the matter. The institutional authorities could refuse her admittance on the grounds of the institution, and no reason is seen why they should require such cooperation for the reason that they have the entire charge of the conduct and discipline in the school and have the sole right and authority to keep, restrain, and control such boys during their minority, or until such time as they shall deem proper for their discharge, under such proper and humane rules and regulations as may be adopted by the trustees. (G. S. 134-69).

AGRICULTURE; FARM CROP SEED IMPROVEMENT DIVISION; CROP
IMPROVEMENT ASSOCIATION; TESTING OF OPEN PEDIGREE
HYBRID CORN SUBMITTED UNDER BRAND NAME

12 January 1948

I have your letter of January 6, 1948, in which you call attention to the fact under the State Seed Law, corn hybrids, to be eligible for sale in this State, must be tested within the State the year previous to the one in which they are offered for sale. The North Carolina Crop Improvement Association conducts these tests. It appears that some commercial organizations take well-known open pedigree hybrids and rename this hybrid corn without disclosing its pedigree. These companies have been proceeding on the idea that you would be expected to handle these brand-name hybrids on the same basis, for testing purposes, that you would handle the various hybrids of different pedigree; and you would like to know if you can refuse to accept these hybrids in your testing program or refuse to approve them if you accept them and find them to be identical to other corn hybrids of well-known pedigree. You also ask if you can prevent numerous commercial companies from selling the same open pedigree hybrids under several names.

I will answer your last question first, which relates to whether or not you can prevent commercial companies from selling the same open pedigree hybrids under several names. It would seem to me that this particular question would have to be handled by the Department of Agriculture of this State under the North Carolina Seed Law. Subsection (10) of Section 106-280 of the Seed Law, which is contained in the General Statutes of this State, is as follows:

"All hybrid corn seed shall have plainly written or printed on the tag or label the name and/or number by which the hybrid is commonly designated."

As you know, the Department of Agriculture handles the labeling of seed and various other things in this connection; and I would think that this part of the question belongs to that Department.

The North Carolina Crop Improvement Association is created under the provisions of Section 106-273 of the General Statutes. It is subject to the rules and regulations of the Farm Crop Seed Improvement Division, created by Section 106-269 of the General Statutes as a part of the Agricultural Extension Service of the State College of Agriculture and Engineering. This Division has control, management and supervision of the production, distribution and certification of pure-bred crop seeds. The North Carolina Crop Improvement Association is subject to the rules and regulations prescribed by the State Board of Farm Crop Seed Improvement; and the North Carolina Crop Improvement Association can, itself, adopt rules and regulations subject to those adopted by the State Board of Farm Crop Seed Improvement. Certification of crop seeds, insofar as the North Carolina Crop Improvement Association is concerned, is confined to State origin, adaptation, variety, name, variety purity, germination, quality, seed purity and other qualifications. So far as germination is concerned, the tests are subject to the supervision of the State Department of Agriculture.

I am of the opinion, therefore, that you should accept these corn hybrids which are tendered to you for testing under a brand name by a commercial company. If you find, however, from your test that this corn hybrid tendered under a brand name is nothing more than an open pedigree hybrid, then in your report, I do not think that you have to report your approval as to the brand name but that you can confine yourself to the pedigree name if the test discloses that the corn tested belongs to that open pedigree name. I do not think that you should be required to certify under the commercial company's brand name or to report your test under the brand name when you find that such brands are identical with corn hybrids of known pedigree. If the company contends that their hybrid is different from any of the standard, open pedigree hybrids, then they should satisfy you of their contention so that you would be justified in reporting under that particular brand name rather than an open pedigree name.

I would advise, however, that before you carry out such a policy that you have a regulation adopted to such effect by the State Board of Farm Crop Seed Improvement and that the North Carolina Crop Improvement Association likewise adopt such a regulation.

AGRICULTURE; NORTH CAROLINA CROP IMPROVEMENT ASSOCIATION; RIGHT
TO FIX PRICE OF CERTIFIED SEEDS; RIGHT OF GROWERS TO FIX PRICES
OF CERTIFIED SEED POTATOES AND HYBRID CORN

27 January 1948

In your letter of January 19, 1948, you inquire if your Association, or the members thereof, have a right to agree upon prices for the certified products which they have for sale. You state the question has particularly been brought to your attention by the growers of hybrid seed corn and Irish potato producers. You also inquire if there is any authority whereby growers would be required to adhere to a price for high quality products.

I think the answer to all these questions outlined in your letter is that so far as I have been able to find, there is no law which would authorize such price fixing. To the contrary, Chapter 75 of the General Statutes,

dealing with monopolies and trusts, specifically prohibits the fixing of prices. I know of no method by which this objective can be legally brought about under the framework of present laws nor do I think it would be of any advantage to incorporate or create an organization for such purpose. If this is a desirable objective, it will be necessary for those persons interested to seek enabling legislation for the purpose of exempting them from our price-fixing statutes.

It is true that the State Board of Farm Crop Seed Improvement apparently has authority to fix the market price of certified seed, which you will find in Section 106-272 of the General Statutes. So far as we know, however, this has never been enforced; and if the State Board of Farm Crop Seed Improvement decides to attempt to exercise any price-fixing authority under this section, we would advise that they confer with the Attorney General before undertaking to exercise such authority.

The fact remains that our laws still favor the operation of a free market which is also the Federal policy under the Sherman Anti-Trust Law and the so-called Clayton Act.

OPTOMETRY ACT; SEPARABILITY CLAUSE

4 March 1948

I received your letter of the 3rd of March, 1948, in which you state that you are advised by counsel that Section 2 of Chapter 630, Public Laws of 1935, amending the Optometry Act, contains a separability clause which is not set forth in the codification of this Act in the General Statutes, Section 115-128.

You request me to advise you whether or not the separability clause still remains in effect, and the reason why this clause does not appear in the General Statutes.

I think the Court would consider that the separability clause to which you refer is still in effect although it was not brought forward in the codification of this law in the General Statutes.

Under Chapter 164 of the General Statutes, in Section 164-7, it is provided that the General Statutes of North Carolina shall not have the effect of repealing statutes or provisions of the statutes relating to the construction or interpretation of statutes. A separability clause is one relating to the interpretation and construction of statutes, and such statutes are expressly preserved from repeal by this section of the General Statutes.

Separability clauses were not brought forward in the General Statutes for the reason that they would unduly incumber the General Statutes, whereas the effect of them could be fully preserved by the section which I have above referred you to.

COUNTY SURVEYOR; ELIGIBILITY TO HOLD OFFICE; REGISTERED LAND SURVEYOR

9 March 1948

You call attention to Chapter 154 of the General Statutes providing for the election of county surveyors and also Chapter 89 of the General Statutes dealing with the registration of engineers and land surveyors.

You state that a person has completed three years in Civil Engineering at State College and would like to know if he can be appointed or elected county surveyor and if his title and official acts would be recognized in Court although he does not hold a degree in Civil Engineering. You state the question in another form as follows:

"But supposing that regulations of the State Board preclude acceptance by it of an applicant who has completed only three years of civil engineering: would such person be eligible to become county surveyor, if elected by the people, or appointed by the board of commissioners to fill a vacancy?"

The office of county surveyor is a constitutional office and is provided for in Article VII, Section 1 of the Constitution of this State. Section 89-16 of the Land Surveying and Engineering Act allows anyone to be a land surveyor if he does not represent himself to be a registered land surveyor. I quote from a part of the Act as follows:

"Nothing in this chapter shall be construed as prohibiting a duly qualified registered engineer from making land surveys; nor as prohibiting any person from doing land surveying provided he does not represent himself to be a registered land surveyor."

The State Board of Registration for Engineers and Land Surveyors recognizes this exemption in the Annual Report of this Board for the year of 1945. In regard to land surveying, the Board states the following on page 9; and I quote:

"There still exists some misconstruction of the law in regard to the status of the land surveyor. This misunderstanding exists not only with the engineers, but with the land surveyors themselves.

"According to the law, registration to practice land surveying is not compulsory. The law *does not prohibit* 'any person from doing land surveying, provided he does not represent himself to be a registered land surveyor.' Practically all of the protests with regard to the administration of the law that have been brought to the attention of the Board have concerned land surveyors, against whom no action can be taken."

I do not see anything, therefore, in the law that would prohibit this man from being appointed or elected county surveyor provided he possesses the constitutional requirements of an elector and is eligible to hold office as prescribed by our laws and Constitution. Our laws do not seem to require any length of experience or educational requirements for this office nor are such requirements, for example, made a condition for holding the office of Sheriff or Clerk of the Court. I, therefore, answer your question that the applicant would be eligible for appointment or election as county surveyor.

While I am not sure, it seems to me that a person who has completed three years of Civil Engineering at State College would be eligible for registration as a land surveyor. You might examine this question further since I am not sure that I have interpreted the regulations of the Board correctly.

CHIROPODISTS; MEANING OF THE WORD "PHYSICIAN" IN WORKMEN'S
COMPENSATION LAW AND GROUP HOSPITALIZATION POLICIES;
ADMINISTRATION OF NARCOTICS

7 June 1948

I received your letter of June 2nd, in which you ask my opinion as to whether or not a chiroprapist would be considered a physician, as that term is used in the Workmen's Compensation law. You also inquire as to whether or not a chiroprapist would be considered a physician within the meaning of the word "physician" as used in group hospitalization policies.

I find no case in this State which has passed upon the question as to whether or not the word "physician," as used in the Workmen's Compensation law would include a chiroprapist. Neither do I find any opinion or decision by the Industrial Commission on this subject.

I would not feel free to express any opinion about this matter until it has been passed upon by the courts or by the Industrial Commission. I would suggest that you might write to Honorable T. A. Wilson, Chairman of the Industrial Commission. It is possible that he would be willing to express his views to you on this subject.

Whether or not the word "physician," as used in group hospitalization policies, would include a chiroprapist is also a matter about which I would not attempt to express any opinion, as this would depend upon the precise language of the policies. Any opinion that I might express on the subject would not be binding upon the hospital associations or their policy-holders.

You inquire also if a chiroprapist is legally entitled to use narcotics in his practice in this State.

The definition of chiropody, as contained in G. S. 90-188, is as follows:

"Chiropody (podiatry) as defined by this article is the surgical, medical or mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local."

As you will observe from this definition, the use of a local anesthetic apparently is permitted but otherwise narcotics cannot be used by chiroprapists.

OFFICE DIGEST OF OPINIONS

MARRIED WOMEN: ELIMINATION OF EXAMINATION. CHAPTER 73; SESSION LAWS 1945

8 May 1946

All requirements heretofore existing under our law requiring the private examination of a married woman in respect to the execution of deeds and mortgages and all other documents and instruments, have been entirely eliminated and repealed.

TAXICABS: OPERATION WITHIN MUNICIPALITY WITHOUT MUNICIPAL PERMIT

8 May 1946

When the operator of a taxicab, who has not secured from a municipality an operator's permit, solicits passengers and operates a taxicab within that municipality, he is guilty of a misdemeanor and subject to a fine of not more than fifty dollars (\$50) or imprisonment for not more than thirty days.

MUNICIPAL CORPORATIONS: LIABILITY FOR TORT OF POLICE OFFICER IN OPERATING PRIVATE CAR. (TOWN OF WELDON)

9 May 1946

A municipal corporation in North Carolina is not liable in damages in case one of its police officers, while driving a private car, accidentally or through carelessness or negligence inflicts damage or injury to property of persons.

MUNICIPAL CORPORATIONS: PARKING METERS IN TOWNS OF LESS THAN 20,000 POPULATION. G. S. 160-200, SUBSECTION 31

9 May 1946

Under our statutes no city or town of less than 20,000 population is authorized to install parking meters.

MUNICIPAL CORPORATIONS: REORGANIZATION OF LAPSED OR DORMANT MUNICIPAL GOVERNMENT

9 May 1946

In cases where there are no surviving members of the governing body of a municipal corporation and no elections have been held in compliance with the municipal charter or the statute creating such corporation, the proper method of reviving or reorganizing the corporation would be through an act of our General Assembly.

**MUNICIPAL CORPORATIONS: PUBLIC HEALTH—INJUNCTION TO REMOVE
NUISANCE ON PUBLIC WATER SHED. G. S. 160-234**

14 May 1946

Our statutes give the governing bodies of cities and towns the power to remove, abate, or remedy anything within the corporate limits or within a mile of such limits which is dangerous or prejudicial to public health, and this power is broad enough to include the right of the municipal authorities to proceed by injunction to remedy any condition within these territorial limits which amounts to a public nuisance and constitutes a menace to the public water supply.

**SCHOOLS: COUNTYWIDE TAX FOR MAINTENANCE AND REPAIR OF CITY
ADMINISTRATIVE UNIT, PLANT AND BUILDINGS. G. S. 115-356**

15 May 1946

Under our school law, if fines, forfeitures, penalties, dog taxes and poll taxes are used with the approval of the State Board of Education for purposes other than maintenance of the school plant and fixed charges, then the county is authorized and required to levy a countywide tax to provide the funds necessary for the maintenance of plant and repair of school buildings, which would include the maintenance of plant and school buildings in city administrative units.

**SCHOOLS: SPECIAL SCHOOL TAX; MAXIMUM TAX RATE.
G. S. 115-361 AND 115-362**

15 May 1946

In North Carolina, a County Board of Commissioners is not authorized to levy any special tax upon the tangible property within the boundaries of a city administrative school unit for the purpose of meeting current school expense unless such tax has been authorized by a vote of the people as provided by our statute for elections for local supplements, which statute also provides that the maximum tax to be levied shall be determined by petition and vote of the people.

ELECTIONS: BALLOTS PLACED IN WRONG BOX

15 May 1946

The fact that a qualified voter inadvertently places a proper ballot in the wrong box does not invalidate his vote in North Carolina.

BEER AND WINE: REVOCATION OF LICENSES. G. S. 18-78

15 May 1946

Under our statutes, the governing body of a municipal corporation has power to cancel or revoke a license for the sale of beer or wine if it is found that the licensee allows the premises to be used for any unlawful, disorderly, or immoral purposes or otherwise fails to carry out in good

faith the provisions of the statute. Such licensee is, however, entitled to an opportunity to appear and defend himself before such cancellation or revocation is ordered.

BEER AND WINE: SALE BY GRADE A RESTAURANTS ON ELECTION DAY.
G. S. 18-47

17 May 1946

We have no statute prohibiting the sale of beer or wine with meals by a properly qualified restaurant on election day provided the alcoholic content of such wine does not exceed fourteen per cent.

MUNICIPAL CORPORATIONS: AUTHORITY OF GOVERNING BOARD TO
MORTGAGE CITY HALL PROPERTY. G. S. 160-59

17 May 1946

In North Carolina the governing body of a municipal corporation is without authority to mortgage city hall property.

TAXATION: AD VALOREM TAX ON PERSONAL PROPERTY; LEVY;
PLACE OF SALE. G. S. 105-385

18 May 1946

A tax collector may proceed against the personal property of a taxpayer at any time after the tax becomes due and before a tax foreclosure complaint is filed, and while the advertising must be posted at the county court house door and three other public places in the county, the sale may be held either at the county court house door or at the site of the property being sold.

VETERANS: EXEMPTION FROM POLL TAX. G. S. 105-341, SUBSECTION 4

18 May 1946

The exemption of members of the armed forces of the United States from poll tax covers the period of the existing state of war between the United States and any foreign nation and extends to the next tax-listing period thereafter; and uncollected poll tax which such members were required to list prior to induction or joining shall be cancelled.

SPEEDING: CARELESS AND RECKLESS DRIVING; JURISDICTION OF MAYORS AND
JUSTICES OF THE PEACE. G. S. 7-129; 20-140, 141; 20-180; 160-13

21 May 1946

Neither mayors nor justices of the peace have final jurisdiction over the offenses of speeding or careless and reckless driving; and it is their duty upon finding probable cause to bind defendants in such cases over to a recorder's court having jurisdiction or to the proper superior court as the case may be.

INHERITANCE TAX: WHEN WAIVER NECESSARY FOR STOCK TRANSFER.
G. S. 105-11

21 May 1946

Under our law, no transfer of stock of a decedent may be made on the books of a corporation chartered in this State without waiver of inheritance tax from the Commissioner of Revenue, regardless of where such corporation owns property or conducts its business and regardless of whether the decedent is a resident of North Carolina or a non-resident; but no such waiver is necessary in the case of transfer of the stock of a foreign corporation unless such corporation owns property in the State, and the decedent was a resident of North Carolina and the stock exceeds \$200.00 in value.

EMINENT DOMAIN: EXTENSION OF STREETS BY MUNICIPALITY;
CONDEMNATION OF PROPERTY. G. S. 40-10 AND 160-205

21 May 1946

The power of a municipal corporation to widen or extend its streets includes the right to proceed by condemnation against residential as well as business property.

EXECUTORS AND ADMINISTRATORS: CAVEAT TO WILLS; ANNUAL REPORTS
AFTER CAVEAT FILED; BONDS. G. S. 28-23; 28-117; 31-36

21 May 1946

The statute suspending further proceedings in relation to an estate upon the filing of a caveat to a will does not relieve the executor or administrator of the necessity of filing annual accounts while the caveat is pending. Neither does the filing of a caveat affect the liability of an executor or an administrator under his bond.

EXECUTORS AND ADMINISTRATORS: DEBTS OF THE SIXTH CLASS;
CHARGES OF CHIROPRACTOR

22 May 1946

Proper charges for services of a duly licensed chiropractic doctor for treatment of the deceased within one year prior to his death fall within the sixth class of debts against the estate and come within the meaning of the term "medical services."

SCHOOLS: SUPERINTENDENTS; CONDITIONAL RESIGNATION

24 May 1946

In case a public school superintendent submits his resignation based upon certain conditions and such conditions fail to develop or cease to exist, the resignation may be withdrawn; and if this conditional resignation has been accepted by the board of education, such action can be rescinded.

SCHOOLS: TEACHERS AND PRINCIPALS; NOTICE OF REJECTION. G. S. 115-359

28 May 1946

Our school law requires that teachers and principals be notified of their rejection prior to the closing of the school term.

EMINENT DOMAIN: MUNICIPAL CORPORATION WITHOUT AUTHORITY TO
CONDEMN STATE SCHOOL PROPERTY

28 May 1946

Under decisions of our Supreme Court, a municipal corporation is without authority to condemn property of a state school for municipal purposes, such as the extension or opening of a street, as the right of eminent domain as generally understood extends only to the right to condemn private property for public use.

MARRIAGE LICENSE: DUPLICATION OF LOST LICENSE

29 May 1946

A register of deeds may issue a duplicate marriage license based upon information obtained from the stub in his office, in the event the original license is lost or destroyed. The duplicate should be so marked upon its face.

COUNTIES: APPROPRIATIONS FOR COMMUNITY RECREATION CENTERS.
G. S. 160-164

30 May 1946

A county has authority to make reasonable appropriations for the operation of a community recreational center, either independently or jointly with a city or town within such county, without a vote of the people; provided, that such appropriation does not involve any special tax levy or the contracting of any debt.

MUNICIPAL CORPORATIONS: CHIEF OF POLICE OR TOWNSHIP CONSTABLE
SERVING AS TAX COLLECTOR; TOWN CONSTABLE SERVING AS
TAX COLLECTOR. G. S. 160-17, 19

30 May 1946

Neither a chief of police nor a township constable can legally hold office also as tax collector, but under our statutes a town constable may also be assigned the duties of tax collector for town taxes.

COUNTIES: BOND ISSUES; CONSTITUTIONAL DEBT LIMITATION

4 June 1946

Under our constitutional debt limitation, a county cannot, without a vote of the people, issue bonds in a sum exceeding two-thirds of the amount by which the outstanding indebtedness of the county has been reduced during the next preceding fiscal year.

ELECTIONS: ELECTION OFFICIALS; COMPENSATION. G. S. 163-20

4 June 1946

Our election laws provide that judges of elections and their assistants shall each receive \$5.00 per diem for their services on the day of a primary or election, and the registrars shall receive \$6.00 per diem for their services on primary and election days; and, in addition, the registrars shall receive for their services \$5.00 for each Saturday during the period of registration.

ABC STORES: SIGNATURES ON PETITION CALLING FOR ELECTION. G. S. 18-61

4 June 1946

An election on the question of the establishment of ABC stores in a county may be called by the county board of elections upon the written request of the board of county commissioners, or upon a petition to said board of elections signed by at least fifteen per cent of the registered voters of the county who voted in the last election for governor.

ELECTIONS: COMPENSATION OF ELECTION OFFICIALS. G. S. 163-20

5 June 1946

A board of county commissioners, in its discretion, may allow reasonable expenses of travel for election officials who are required to make necessary trips or perform additional services in connection with their official duties, such as receiving and returning registration books and canvassing election returns. There is no authority, however, for compensation of anyone other than election officials.

JUDICIAL SALES: OPA REGULATIONS

5 June 1946

Under current Federal regulations, property sold under judicial orders and proceedings are exempt from OPA ceiling price control.

TAXATION: LICENSE AND PRIVILEGE TAX; FREEZER LOCKERS; MUNICIPAL TAX. G. S. 160-56

5 June 1946

Under North Carolina law, cities and towns may annually levy a tax on all trades and professions carried on within the city limits unless otherwise provided by law; and this authority is broad enough to cover a municipal privilege or license tax on the operation of freezer lockers.

CRIMINAL LAW: GAMBLING; BINGO

6 June 1946

The game of bingo as ordinarily played is a game of chance and the playing of it is a violation of the gambling laws of this State.

TAXATION: EXEMPTION

7 June 1946

Exemption of property from taxation is controlled by statute in North Carolina, and a board of county commissioners has no authority to exempt property not specifically exempted by such statutes. Real property owned and actually and exclusively occupied by Y.M.C.A.s and religious organizations, orphanages and other similar homes, hospitals and nunneries not conducted for profit but entirely and exclusively conducted as charitable institutions, are specifically exempted by statute.

MUNICIPAL CORPORATIONS: SCHOOL BUILDING BONDS; TIME FOR ISSUANCE

7 June 1946

There are no provisions in the so-called "Cleveland County Act" requiring bonds to be issued within a specific time after the bond election is held and the issuance approved. In the absence of such provision, the question of the time of issuance rests within the discretion of the governing body.

COUNTIES: SPECIAL TAX FOR COUNTY HEALTH DEPARTMENT.
G. S. 130-29; 153-9

7 June 1946

Our statutes provide that a board of county commissioners may at any time levy a special tax to be expended for the preservation of the public health under the direction of a committee composed of the chairman of the board of county commissioners and the county health officer or the county physician.

MORTGAGES: CHATTEL MORTGAGES ON AIRCRAFT; REGISTRATION

7 June 1946

No conveyance which affects the title to or any interest in any civil aircraft in the United States shall be valid in North Carolina against any person other than the person by whom such conveyance is made, or his heirs or devisees, or persons having actual notice thereof, until such conveyance is recorded with the Civil Aeronautics Authority as well as with the register of deeds of the proper county.

MUNICIPAL CORPORATIONS: RESIDENCE REQUIREMENTS FOR POLICE OFFICER;
TEMPORARY REMOVAL OUT OF CORPORATE LIMITS. G. S. 160-25

10 June 1946

Our statutes require that a person holding the office of mayor or police chief or police officer in any city or town must be a resident and a qualified voter therein, but a person who removes from a city or town or a voting precinct temporarily with the full intention of retaining his voting privilege and his residence therein and returning as soon as the temporary conditions which prompted his removal no longer exist, does not lose his right to vote or hold office in his original unit of government.

GRAVES: CHURCHES; REMOVING REMAINS OF DECEASED PERSONS.
G. S. 65-13, 14

10 June 1946

Our statutes provide that when church property containing a cemetery is sold, or it becomes necessary or expedient to remove certain graves in order to extend church buildings, the proper church authorities have the right to remove the bodies to another suitable cemetery on church property or elsewhere. It is required, however, that thirty days' notice be given to the next of kin of the deceased, and that all monuments be properly protected and replaced at the new location.

RURAL ELECTRIFICATION: AUTHORITY; TAXATION OF PROPERTY

10 June 1946

Property owned by a rural electrification authority or electric membership corporation and used exclusively for the purposes for which such authority or corporation was created is subject only to such taxes and assessments as would attach to property owned by any county or municipality of the State.

MUNICIPAL CORPORATIONS: AUTHORITY OF MUNICIPAL CORPORATION TO
EXTEND POWER OF POLICE OFFICER BY ORDINANCE

12 June 1946

A police officer can only exercise such powers as are granted by the legislature, and, in the absence of a public-local act or some charter provision to the contrary, a municipal corporation is without authority to extend the power of a municipal police officer by ordinance.

EXECUTORS AND ADMINISTRATORS: CHARGES FOR PUBLICATION OF NOTICE.
G. S. 1-596; 28-47

12 June 1946

In North Carolina there is now no flat charge for the publication by newspapers of administrators' and executors' notices to creditors and, consequently, the regular commercial advertising rate of each particular newspaper should apply.

TAXATION: COUNTIES; NO POWER TO EXEMPT POOR AND INFIRM
FROM FEDERAL TAX. G. S. 105-53

13 June 1946

Our statutes giving boards of county commissioners the power to grant tax exemption in certain specific cases do not specify the "poor and infirm" as such, nor is any such power implied. Therefore, a board of county commissioners is without authority to exempt the poor and infirm from the license tax required of peddlers.

COUNTIES: SALE OF COUNTY PROPERTY; PUBLIC ADVERTISEMENT;
SCHOOL PROPERTY

13 June 1946

We have no statute requiring that sale of real estate owned by a county for farm purposes or general purposes be at public sale and after public advertising, nor is there any requirement that sale of county-owned personal property be at public sale and after advertisement. Our statutes do provide, however, that school property can be sold only at public sale and after public advertisement.

MUNICIPAL CORPORATIONS: STREET IMPROVEMENT BONDS; PERIOD OVER
WHICH BONDS MAY RUN; CHARACTER OF CONSTRUCTION.
G. S. 160-382

15 June 1946

Under our statutes municipal street improvement bonds issued to construct the type of pavement classified as waterbound macadam must mature not later than ten years from the date of issuance.

SALES TAX: NO PROHIBITION AGAINST INCREASING PRICE TO INCLUDE TAX

17 June 1946

Our State sales tax law does not require that the amount of the sales tax be stated separately from the price of the article, nor is there any prohibition against increasing the price sufficiently to transfer the burden of the tax to the shoulders of the consumer. Our statute does prohibit the retailer from advertising to the effect that he will absorb the sales tax.

MUNICIPAL CORPORATIONS: ORDINANCES; HEALTH; POLLUTION OF WATER
WITHIN MUNICIPALITY. G. S. 130-27; 160-52; 160-200; 160-234

17 June 1946

In North Carolina municipal corporations are authorized to abate, remove or remedy any condition within the corporate limits or within a mile thereof which is dangerous or prejudicial to the public health, and municipal ordinances which tend to promote the health of the citizens of such municipality are valid when such ordinances are reasonable. Thus, an ordinance reasonably prohibiting the dumping of refuse or culled fish or shrimp heads, or the like, in the water of a harbor inside the corporate limits would be valid.

TREE SURGEONS: G. S. 160-56

North Carolina cities and towns have statutory authority under their general taxing powers to levy license or privilege taxes on the practice of tree surgery.

MOTOR VEHICLES: UNIFORM DRIVER'S LICENSE ACT; SCOOTER BIKES AND
MOTOR-PROPELLED BICYCLES OPERATED BY PERSONS UNDER
15 YEARS OF AGE. G. S. 20-7 AND 20-9

20 June 1946

Motor driven scooter bikes and motor propelled bicycles in general fall within the class of motor vehicles as defined in our Uniform Driver's License Act, and their operation by persons without operator's or chauffeur's licenses is a violation of State law.

Further, persons under the age of 15 years are not entitled to chauffeur's or operator's licenses in North Carolina.

ABC ACT: DISPOSITION OF FUNDS FOR LAW ENFORCEMENT. G. S. 18-45(o)

21 June 1946

Under our statutes, a county ABC board is authorized to turn over to the governing body of a municipality within the county a portion of those ABC funds retained for law enforcement purposes, to be applied by the governing body of such municipality in paying part of the salary of a town police officer engaged in general law enforcement work, including the enforcement of the prohibition laws within the corporate limits of the municipality.

ABC ACT: CHIEF OF POLICE AND ABC OFFICER; DUAL OFFICE HOLDING

21 June 1946

A chief of police of a municipality and an ABC law enforcement officer are both holders of public offices under our laws, and one person may not hold both offices at the same time under our constitutional prohibition against dual office holding.

LICENSE TAXATION: TOWN LIMITED TO ONE ANNUAL LICENSE TAX OF
TEN DOLLARS ON EACH CONTRACTOR. REV. ACT, SEC. 122 (f)

25 June 1946

Under our Revenue Act, cities and towns are prohibited from levying any license tax on a contractor except the annual license tax of ten dollars, expressly provided for in the statute.

CORONER'S INQUISITION: RIGHT OF ACCUSED TO REPRESENTATION BY
COUNSEL AT HEARING. G. S. 152-7

27 June 1946

Our statutes provide that an accused person has the right to be represented by counsel at a coroner's inquest, and such counsel may participate in the hearing and examine and cross-examine witnesses.

MUNICIPAL CORPORATIONS: OFFICERS; LAW ENFORCEMENT OFFICERS' FUND—
RETIREMENT AND REEMPLOYMENT

28 June 1946

A municipal corporation may not supplement the retirement benefits received from the Law Enforcement Officers' Benefit and Retirement Fund by a retired officer; nor may it reemploy such retired officer in the capacity of a law enforcement officer without cutting off the officer's right to benefit under the Retirement Fund. It may, however, in good faith, employ such retired officer in a capacity other than that of a law enforcement officer and pay him for performance of his duties in this new capacity, without affecting his rights under the Law Enforcement Officers' Benefit and Retirement Fund.

INHERITANCE TAXATION: WAR BONDS

3 July 1946

When a War Bond is issued in the name of co-owners, so much of the value of such bond as was purchased by funds of a deceased co-owner must be included in his estate for the purpose of computing inheritance tax.

TAXATION: REAL PROPERTY EXEMPTIONS; PROPERTY OWNED BY AN
INDIVIDUAL BUT USED FOR CHURCH PURPOSES. G. S. 105-296

2 July 1946

Real property owned by an individual, and not by any church or other religious body, nor by a board of trustees for a church or other religious body, is not exempt from taxation under our laws, even though such property may be used exclusively for church or religious purposes.

CIGARETTE DISPENSERS: RETAILERS OF TOBACCO PRODUCTS.
SECTION 130½, REVENUE ACT

2 July 1946

There is no provision in our law to prevent a municipality from levying a distributor's or operator's occupational license tax on cigarette dispensers or vending machines under Section 130½ of our Revenue Act, and, in addition, also levying a license tax on retailers of tobacco products under Section 149 of the Revenue Act.

COURTS: RECORDERS; JURY FEES; MISTRIALS; REFUND

2 July 1946

When a defendant demands a jury trial in a recorder's court, and makes the deposit required in such cases, and the trial results in a mistrial, the defendant would not be entitled to a refund of such deposit and would be required to make another deposit in order to be entitled to have his case retried before a jury.

SCHOOLS: CITY ADMINISTRATIVE UNITS; TITLE TO SCHOOL SITE;
CAPITAL OUTLAY. G. S. 115-88

5 July 1946

Before a county board of education or the board of trustees of a city administrative unit may lawfully enter into any contract for the erection or repair of any school building, or expend any school funds therefor, title for the proposed site must be vested in such board, and the deed thereto properly registered and deposited with the clerk of the superior court of the proper county.

MOTOR VEHICLES: DEALER'S LICENSE PLATES; PRIVATE USE.
G. S. 20-79 AND 20-86

5 July 1946

If a motor vehicle dealer owns a motor vehicle and it is used in the motor vehicle business of such dealer, our law authorizes the use of state dealer's license plates on such vehicle. The dealer could not, however, lawfully rent out a vehicle bearing such dealer's license plates.

AERONAUTICS: LOW AND DANGEROUS FLYING; CRIMINAL LAW. G. S. 63-18

9 July 1946

Our criminal statutes make it a misdemeanor for any person operating aircraft to engage in trick or acrobatic flying over a thickly inhabited area, or over a public gathering, or, except while landing or taking off, to fly at such a low level as to endanger persons beneath, or to drop any object from such aircraft except loose water or loose sand ballast.

AD VALOREM TAXATION: WAIVER OF PENALTIES FOR FAILURE TO LIST.
G. S. 105-33

11 July 1946

In North Carolina, a board of county commissioners has the authority, within its discretion, to remit the penalty imposed by statute for failure to list property for ad valorem taxation.

MOTOR VEHICLE LAWS: SPEED REGULATIONS; JURISDICTION OF
JUSTICE OF THE PEACE. G. S. 20-141

16 July 1946

Under our laws a justice of the peace does not have jurisdiction in cases of violation of State speed laws.

ARRESTS: HOT PURSUIT ACT; A.B.C. ACT; POLICE OFFICERS; CONSTABLES

16 July 1946

The only persons authorized by our statutes to cross county boundary lines in hot pursuit of a fugitive are the sheriffs of the county in which a felony has been committed and his bonded deputies. A police officer's

authority of arrest is limited to the corporate limits of the city or town which he serves and a constable's authority of arrest is limited to his county. The only other statute authorizing any peace officer to cross boundary lines in hot pursuit of a person charged with crime is contained in our A.B.C. Laws and is limited to the pursuit of violators of the prohibition laws.

SPECIAL ELECTIONS: REGISTRATION PERIOD; CHALLENGE DAY.

G. S. 160-37, 160-39

18 July 1946

In case a special election is held under our statutes the registration books are open on the second Saturday before the election only for the purpose of permitting challenges and not for registration.

CRIMINAL PROCEDURE: EXTRADITION COSTS IN MISDEMEANOR CASES.

G. S. 15-78

Where extradition is granted in cases of misdemeanor, the costs incident to the extradition must be paid by the county in which the offense occurred.

MOTOR VEHICLE LAWS: COURTS; SUSPENDED SENTENCES; REVOCATION OF DRIVER'S LICENSE BY COURT

19 July 1946

Under our statutes and decisions, a court is without jurisdiction to revoke a driver's license even upon conviction of an offense which would be grounds for revocation by the Department of Motor Vehicles. This does not mean, however, that the court does not have the authority to suspend sentence upon condition that the defendant does not operate a motor vehicle upon the highways of the State.

INTANGIBLE TAX: BANK DEPOSITS; NONRESIDENT DEPOSITORS.

REVENUE ACT, SECTION 701

20 July 1946

A nonresident's bank deposits are liable for intangible tax in this State only when such deposits are related to business activities in the State or have a business, commercial, or taxable status in this State.

CRIMINAL LAW: PRIVATE DETECTIVES; POWER OF ARREST;

RIGHT TO CARRY WEAPONS

In North Carolina a private detective is not authorized to make arrests nor to carry concealed weapons. In these respects his status is the same as that of any other private citizen.

NOTARIES PUBLIC: POWERS. G. S. 10-6

22 July 1946

The authority of notaries public to perform the functions of their office is state-wide and the removal of a notary from one county to another does not affect or curtail this authority.

CORPORATIONS: FIRST ORGANIZATION MEETING MUST BE HELD IN STATE

22 July 1946

Our law requires that the first meeting of stockholders of a North Carolina corporation, for the purpose of organization, must be held in this State and cannot be legally held elsewhere.

BOARD OF ACCOUNTANCY: VETERANS' EXEMPTION FROM LICENSE FEES.

G. S. 105-249.1

23 July 1946

Under our statutes, Veterans of World War II are exempt from the payment of the license fees required of Certified Public Accountants only during the period in which they were actually in the armed forces of the United States.

SALES TAX; EXEMPTIONS: USED ARTICLES; USED AUTOMOBILE PARTS.

G. S. 105-168, 105-169

24 July 1946

Our 3% sales tax applies to retail sales of parts from junked automobiles, as such parts do not come within the exemptions set out in our statutes.

DIVORCE AND ALIMONY: PROCEDURE WHERE ONE PARTY INSANE; GROUNDS FOR ABSOLUTE DIVORCE. CH. 755, SES. L. 1945, G. S. 50-56

24 July 1946

Our divorce laws as amended in 1945 provide that insanity of a spouse, when properly established, constitutes grounds for absolute divorce.

GAME AND FISH LAWS: WHEN LICENSE REQUIRED TO FISH IN PRIVATE POND.

G. S. 113-14, 113-143, 113-154

26 July 1946

Under our fish and game laws, any person other than the owner or a member of his family under twenty-one years of age must obtain a state license before fishing in a private pond, even upon invitation by the owner.

CRIMINAL LAW: WEAPONS; PERMITS TO BUY AND SELL; CONCEALMENT.

G. S. 14-402, 14-269, 14-339

29 July 1946

The mere fact of possession of a pistol is not sufficient to convict of the offense of unlawfully acquiring such weapon, but if any person is found off his own premises having about his person a pistol or other deadly weapon, as named in the statute, such possession shall be prima facie evidence of its concealment.

STREET ASSESSMENTS: LAND LIABLE FOR ASSESSMENT. G. S. 160-85

29 July 1946

A street improvement assessment is a liability created by statute and is a charge only against the specific property benefited by a local improvement. If the property benefited is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the owner.

ELECTION LAWS: INDEPENDENT CANDIDATES; PROCEDURE FOR PLACING NAMES ON BALLOT. G. S. 163-152

31 July 1946

Under our election laws, when the time prescribed by law for the nomination of candidates by political parties has expired, a person seeking office as a political candidate may not file for office as an independent candidate.

POLL TAX; EXEMPTIONS: ARTICLE V, SECTION 1, CONSTITUTION OF NORTH CAROLINA, G. S. 105-341, 342

2 August 1946

Unless otherwise exempted under the Constitution and laws of this State, all male persons over twenty-one and under fifty years of age may be subject to the payment of poll tax in North Carolina.

COUNTIES; TAXATION; AIRPORTS

2 August 1946

There is no authority under our laws by which a Board of County Commissioners may levy a tax for the purpose of building an airport in the county without a vote of the people.

COUNTIES; TAXATION; FAIR GROUND PROPERTIES

A Board of County Commissioners in North Carolina is without authority to levy a tax without a vote of the people for the purpose of purchasing property upon which to erect buildings and conduct a county fair. Moreover, there is no authority for a county to submit the question of levying a tax for such a purpose to a vote of the people. In order for a county to acquire property for fair ground purposes, or to construct buildings to be used for a county fair, a special act of the Legislature would be required.

REGISTER OF DEEDS; REGISTRATION OF INSTRUMENTS; TEMPORARY INDEX. G. S. 161-14

2 August 1946

Our statutes require a Register of Deeds to register forthwith all instruments delivered to him for registration, and after endorsing on such instruments the day and hour of their presentation, he is required to index and cross-index the same immediately. However, in lieu of a permanent

index, he may prepare and use a temporary index until such time as the instruments are actually recorded, and if such a temporary index is used, each instrument must be entered thereon immediately upon presentation to the register of deeds.

COUNTIES; BOND ISSUES; NECESSARY EXPENSES; COUNTY FINANCE ACT:
CONSTITUTION OF NORTH CAROLINA, ARTICLE VII, SECTION 7;
ARTICLE V, SECTION 4, G. S. 153-78, SUBSECTION 2

2 August 1946

Where county bonds are to be used for necessary expenses, Article VII, Section 7 of our Constitution, does not require that the question be submitted to a vote of the people, but our county finance act provides that the question may be so submitted. However, if the debt limitation provisions of Article V, Section 4 of our Constitution makes it necessary to submit the question to a vote of the people, a majority of the qualified voters is not required in order to carry the election, but only a majority of those who actually vote in such election. The question of whether a new registration shall be required for such an election is a matter to be determined by the governing body of the county, in their discretion.

ELECTIONS; FORGING ELECTOR'S NAME ON REGISTRATION BOOK

3 August 1946

No person, whether an election official or not, has any authority to forge or to register anyone's name in a registration book, except upon the application of the person desiring to register. Any person who forges or otherwise causes the name of anyone to be entered upon the registration books except as provided by law, is guilty of a violation of our election laws.

WEAPONS; SALE; CLERKS CERTIFICATE. G. S. 14-403, 404

3 August 1946

Under our statutes, no pistol, pump-gun, bowie knife, dirk, dagger or metallic knucks may be sold or otherwise disposed of, nor bought or otherwise acquired, unless a license or permit therefor shall have first been obtained by the purchaser or receiver from the Clerk of the Superior Court of the county in which such purchase or transfer is intended to be made. Furthermore, no such license or permit shall be issued by such clerk unless he is satisfied that the possession of such weapon is necessary for the self-defense or the protection of the home of an applicant who is of good moral character.

MUNICIPALITIES: SALE OF FIREWORKS

15 August 1946

North Carolina has no state-wide statute prohibiting the sale of fireworks. This being left to local control through municipal ordinances or public-local or private acts of the Legislature.

MUNICIPALITIES: FILLING VACANCY ON TOWN BOARD. G. S. 160-8

15 August 1946

In the absence of a charter provision to the contrary, a vacancy in the governing board of a municipality may be filled through appointment by the remaining members of the board, such appointment to hold good until the next election.

MUNICIPALITIES: PROVIDING SEWAGE OUTLETS FOR INDUSTRIAL PLANTS TO PROTECT MUNICIPAL SEWERAGE SYSTEM

15 August 1946

A municipality is within its rights in purchasing, with public funds, rights of way and easements from riparian owners and others for the purpose of providing means of disposing of industrial wastes such as dyes and caustics, so as to avoid the discharge of such industrial wastes into the municipal domestic sewerage system to the detriment of the municipal disposal plant.

DOUBLE OFFICE HOLDING: CONSTITUTION OF NORTH CAROLINA,
ARTICLE 14, SECTION 7

15 August 1946

Our constitutional prohibition against double office holding specifically exempts from its provisions: offices in the militia, notaries public, justices of the peace, commissioners of public charities and commissioners for special purposes.

INTOXICATING LIQUORS: POSSESSION IN WET COUNTY; TRANSPORTATION.
G. S. 18-32

19 August 1946

In North Carolina it is lawful for a person to have in his possession in a county subject to the A.B.C. Act, tax paid liquor not in excess of one gallon. However, if the amount exceeds one gallon, a rebuttable presumption arises that the possession is for the purpose of sale. Furthermore, the transportation of alcoholic beverages in this state in quantities in excess of one gallon is unlawful, unless the same is for delivery to a Federal reservation exercising exclusive jurisdiction or is being transported through this State to another state in accordance with our statutory provisions.

NOTARIES PUBLIC: ELIGIBILITY OF MINOR TO HOLD PUBLIC OFFICE

19 August 1946

Under our law, a notary public is a public officer, and in order to hold public office in North Carolina, one must be a qualified voter; and as a minor cannot be a qualified voter, it follows that a minor cannot qualify as a notary public.

CONSTABLES: CRIMINAL LAW; A.B.C. LAWS

19 August 1946

While it is not the primary duty of a constable to enforce our prohibition laws, he does have authority to make arrest in cases in which he holds warrants for specific offenders against such laws, or where the offense is committed in his presence.

MUNICIPALITIES: CONTRIBUTION TO CHAMBER OF COMMERCE OR STATE-WIDE PLANNING COUNCIL

19 August 1946

Boards of County Commissioners and the governing bodies of municipalities are without authority to make contributions of public funds, without a vote of the people, to Chambers of Commerce or county-wide planning councils for the purpose of advertising or attracting industry to the community.

CRIMINAL PROCEDURE: WARRANTS; WHO MAY ISSUE. G. S. 15-18

5 August 1946

The only persons authorized by our state laws to issue criminal warrants are the judges of the Supreme Court, the Superior Court, the presiding officers of inferior courts, justices of the peace and mayors of cities or towns.

LEGAL SETTLEMENT: CHANGE OF SETTLEMENT. G. S. 153-159

5 August 1946

Under our statutes, the legal settlement of legitimate children follows that of their father, if he has a settlement in this State, but if he has none, the children take the settlement of their mother, if she has any. Every legal settlement continues until it is lost or defeated by the acquiring of a new one, and upon the acquiring of a new settlement, all former settlements are defeated and lost.

VETERANS: DENIAL OF BENEFITS TO PERSONS DISCHARGED OTHER THAN HONORABLY. G. S. 115-359-1 AND 165-23, *et seq.*

5 August 1946

Persons discharged other than honorably from the armed forces of the United States are not entitled to those credits for experience increments granted public school teachers, principals and superintendents honorably discharged from the armed forces.

VETERANS: VETERANS RECREATION AUTHORITIES LAW

In order to be entitled to benefits under North Carolina's Veterans Recreation Authorities Law, a serviceman must have been honorably discharged.

EMINENT DOMAIN: JUDGMENT OF COURT IN LIEU OF DEED. G. S. 40-19

5 August 1946

Whenever, in condemnation proceedings under the right of eminent domain, a judgment is rendered in favor of a municipality, divesting all other parties of all rights and title to the property involved, such judgment is sufficient to vest title in the municipality, without the execution of a deed of conveyance.

ELECTIONS: SCHOOL BOARD ISSUE ELECTIONS HELD ON REGULAR ELECTION DAY; ABSENTEE BALLOTS

9 August 1946

Under our law, absentee ballots cannot be used in special elections, and the mere circumstance that a school bond election is held on the same day as a general election does not change the rule so as to permit the use of absentee ballots in such bond election.

TAX CERTIFICATES: JUDGMENTS. G. S. 105-242

9 August 1946

A tax warrant docketed in the office of a clerk of the Superior Court by the Commissioner of Revenue under the authority of our statute, becomes a lien on the real property of a delinquent taxpayer from the date of such docketing, this lien having the same force and effect as any other judgment and being subject to the same limitations.

MARRIAGE: SOLEMNIZATION. G. S. 51-1

14 August 1946

One of the requisites of marriage in North Carolina is that the contracting parties must take the vows of matrimony each in the presence of the other. This requirement, obviously, could not be met over the telephone.

CRIMINAL LAW: COSTS; LIABILITY OF COUNTIES FOR COSTS. G. S. 6-39; 6-40

3 September 1946

In all criminal cases where a county is adjudged liable for costs, that county in which an offense is alleged to have been committed is the proper county to pay such costs and this liability is not affected by the removal of a case from one county to another for trial, the county in which the offense is alleged to have been committed still being liable for such costs.

MUNICIPALITIES: JURISDICTION AND POWERS OF POLICE OFFICERS

4 September 1946

A municipal police officer, as such, has no authority under our law to make an arrest outside the corporate limits of such city or town; neither has he any authority to collect costs from anyone charged with a criminal offense, either within or without such corporate limits, without first submitting the matter to a proper court for adjudication.

MUNICIPALITIES: POLICE OFFICERS AS COLLECTING AGENT FOR MUNICIPALITY.
G. S. 160-261; 160-265

4 September 1946

Unless he has given bond as required by statute, a police officer, as such, is not authorized to collect taxes, or water bills, or to receive any other public money due the municipality, as our law requires that all officers collecting or receiving such public funds in excess of \$100.00 shall, before so doing, enter into bond with good and sufficient sureties, conditioned upon faithful performance of his duties, and a proper accounting for all such funds coming into his hands.

PROHIBITION LAWS: A.B.C. ACT; MINORS. G. S. 18-46;
18-51; 18-78.1; 18-90.1

Under our A.B.C. Act, it is unlawful for any person to sell any alcoholic beverage to a minor, and this includes wine and beer. It is also unlawful for any person to drink or offer to another any alcoholic beverage upon the premises of any A.B.C. store, or upon any premises used by any county A.B.C. board, or upon any public road or street.

TAXATION: AD VALOREM - PERSONAL PROPERTY; PICCOLOS; PLACE OF LISTING.
G. S. 105-302

4 September 1946

For purposes of ad valorem taxation in North Carolina, musical instruments and devices, including those commonly known as piccolos, are required to be listed at the place of legal residence of the actual owner.

DIVORCE: GROUNDS FOR ABSOLUTE DIVORCE

5 September 1946

Our statutes contain no provision whereby one party to a marriage can obtain an absolute divorce from a spouse solely upon the grounds that such spouse had been convicted of a felony.

MUNICIPALITIES: CONTRIBUTIONS TO MUSIC CLUBS

5 September 1946

There is no legal authority in North Carolina by which a municipality can make contributions out of public funds to music clubs or civic music associations.

CRIMINAL LAW: MOTOR VEHICLES; INTOXICATED DRIVERS OF HORSE-DRAWN
VEHICLES UPON HIGHWAYS. G. S. 20-38(5) (tt);
20-138; 20-179; 20-171

5 September 1946

In this State, a person driving a horse-drawn vehicle upon the highways while under the influence of intoxicating liquor, or narcotic drugs, is, upon conviction, punishable under our motor vehicle laws just as if he had been operating a motor vehicle under the same conditions.

SCHOOLS: BUSES; CHILDREN RESIDING WITHIN MILE AND A HALF OF SCHOOL

Our law does not require that transportation be furnished pupils living within one and one-half miles of the school to which they have been assigned, but it is required that school buses be routed so as to pass within one mile of the residence of pupils who live more than one and one-half miles from such school.

COURTS: MAYORS' COURTS; JUSTICE OF THE PEACE; AUTHORITY OF MAYOR TO DELEGATE JUDICIAL POWERS TO J. P. G. S. 7-147

6 September 1946

A mayor is without authority under our law to delegate his judicial powers to a justice of the peace, and thus prevent the removal of a cause, or confer any additional jurisdiction on such justice of the peace. A justice of the peace can only act in his own official capacity, and any case coming before him may be removed for trial before another justice of the peace, under conditions set forth in our statutes.

MUNICIPALITIES: PARKING LOTS; USE OF SIDEWALK FOR INGRESS AND EGRESS

6 September 1946

A municipality has authority to prescribe the conditions under which the operators of filling stations and parking lots may use the public sidewalks for purposes of ingress and egress to and from such places of business.

**INTANGIBLES TAX: SCHOOLS; DISTRIBUTION OF INTANGIBLES TAX.
G. S. 105-213**

9 September 1946

That portion of our State intangibles tax which, under our statutes, is allocated to the counties and municipalities of the State, must be distributed and used by such counties and municipalities in proportion to other tax levies made for the various funds and activities of the taxing unit receiving the allotment.

PUBLIC ACCOUNTANT: USE OF TITLE "ACCOUNTANT." G. S. 93-3

9 September 1946

It is unlawful under our statutes for a person who does not hold a certificate admitting him to practice as a certified public accountant to engage in practice as such, or to hold himself out as a certified public accountant. Our statutes have not gone so far, however, as to prohibit the use of the simple title of "accountant" by persons who have not qualified as certified public accountants.

MUNICIPAL CORPORATIONS: REPEAL OF CHARTER; DISSOLUTION.
G. S. 160-354; 160-356

9 September 1946

The charter of a municipal corporation may be repealed and the corporation dissolved in the following ways:

An act of the General Assembly may provide for the repeal of the charter upon the satisfaction of all the outstanding obligations of the municipality; or the governing body of a municipality may, by ordinance, submit the question of repealing the charter to a vote of the people; or the voters themselves may by petition to their governing body have the question of repeal submitted to a vote of the people, such petition to be signed by not less than 25% of the voters entitled to vote in the next preceding election in such municipality.

MUNICIPALITIES: STREET ASSESSMENTS. G. S. 160-91

12 September 1946

A municipality has no authority to require property owners to pay street improvement assessments in cash, as the statutes give the privilege of payment by equal annual instalments over a period of not less than five nor more than ten years. However, dissenting property owners are liable for street paving assessments in the same manner as other abutting owners, provided the statutory procedure has been followed in making such assessments.

MUNICIPALITIES: BUILDING REGULATIONS

12 September 1946

It is a proper exercise of its police power for a municipality to reasonably regulate or prohibit construction or use of buildings which are unfit for human habitation, or which are otherwise dangerous to the health, safety or morals of the community. There is no authority, however, by which a municipality can prescribe the cost of a proposed building, or prevent construction on purely aesthetic grounds.

MUNICIPAL ORDINANCES: MOTOR VEHICLE LAWS; UNNECESSARY NOISES.
G. S. 20-128

13 September 1946

Municipalities have authority by proper ordinance to regulate, control and prohibit all unnecessary noises or practices tending to annoy or frighten persons on the streets or sidewalks or other public places within the municipality. This authority extends to unnecessary noises created by the operation of motor vehicles. Our motor vehicle laws prohibit the operation of motor vehicles not equipped with a muffler in good order and actual operation.

MUNICIPAL CORPORATIONS: COUNTIES; ABATTOIRS; NECESSARY

13 September 1946

Our statutes authorize the joint construction of an abattoir by a municipality and a county, and special municipal and county taxes may be issued for that purpose. This being a necessary governmental expense, no vote of the people of the municipality and the county would be required.

MUNICIPAL CORPORATIONS: MAY NOT WARRANT TITLE

24 September 1946

In the absence of authorization by special act of the General Assembly, a county, city or town cannot give a deed with warranties of title to real estate which it owns and desires to sell.

COURTS: RECORDER'S; JURY TRIALS; APPEAL. G. S. 7-228; 15-179

13 September 1946

Upon demand of any party to a trial in a municipal or a county recorder's court, or before a justice of the peace, a jury trial may be had. However, should the State request such a jury trial, and the court refuse to grant it, it is doubtful whether an appeal from the court's ruling would be sustained.

PROCESSES: PEACE WARRANTS; JUDGE OF MUNICIPAL COURT MAY ISSUE;
CLERK MAY NOT. G. S. 7-202; 15-28; 15-32

18 September 1946

The judge of a municipal recorder's court is authorized to issue a peace warrant, but the clerk of such court has no such power, as a peace warrant is issued in mere apprehension of the commission of an offense, while our statutes authorize clerks of municipal recorder's courts to issue warrants only for the arrest of persons actually charged with the commission of offenses.

JURORS: FEES; RIGHT OF COUNTY OFFICERS AND AGENTS TO
RECEIVE JURY FEES. G. S. 9-19; 6-52

18 September 1946

We have no statute prohibiting county officers and agents from receiving jury fees for jury service, and in the absence of a public-local act to the contrary, they would be in the same position in this respect as any other private individual. There is, however, a statute forbidding salaried law enforcement officers from receiving witness fees for attendance on trials within the territorial boundaries in which such officers have authority to make arrests.

TAXATION: COUNTY TAX COLLECTION; SETTLEMENT. G. S. 105-390 (c)

20 September 1946

All persons collecting taxes, current or delinquent, who fail to succeed themselves at the end of their term of office, are required, on the last business day of such term, to make a full and complete settlement and accounting for all funds and records in their hands.

SCHOOLS: TEACHERS; CONTRACTS NOT BINDING UNTIL REDUCED TO WRITING. G. S. 115-12; 115-19; 115-20; 115-112; 115-142; 115-354

24 September 1946

A contract of employment between a teacher and school authorities is not binding until executed in writing and approved by the superintendent, and a teacher cannot be penalized unless the contract alleged to have been broken had previously been so executed and approved.

DETECTIVES: PRIVATE DETECTIVES

27 September 1946

We have no statute specifically prohibiting a person under twenty-one years of age from acting in the capacity of a private detective for a store, hotel, or other establishment. There is, however, a state-wide annual license tax levied by the Revenue Act on each person who engages in the business of a private detective.

COUNTIES: COMMUTATION OF SENTENCE OR DEDUCTIONS FROM SENTENCE FOR GOOD BEHAVIOR. G. S. 14-263; 14-265; 153-195

30 September 1946

A jailor is without authority in North Carolina to allow any prisoner any commutation or reduction of sentence on account of good behavior, or work performed around the jail or court house. This power, where it exists at all, rests with the county commissioners or the governing boards of cities or towns.

PRIVATE DETECTIVES: LICENSE REQUIREMENTS

1 October 1946

The only legal requirement for one to obtain a license in this State for the privilege of engaging in the business of a private detective is to apply for and receive from the Commissioner of Revenue of the State a privilege license for engaging in such business.

ELECTIONS: QUALIFICATIONS OF VOTER; RESIDENCE

16 October 1946

In order to qualify as a voter in a general election in North Carolina, a person must have attained the age of 21 years, and must have been a resident of the State for at least one year, and of the precinct, ward or

other election district in which he offers to vote for a period of at least four months, next preceding such election. The questions involved in determining the qualification to vote are questions for the registrars to decide in the light of the circumstances of each particular case, and as the question of residence often depends upon the intent of the voter, no hard and fast rule can be applied.

CRIMINAL LAW: EXPLOSIVES; PERMIT FROM BOARD OF COUNTY
COMMISSIONERS FOR STORAGE OF DYNAMITE

18 October 1946

It is a violation of our criminal law for any person to sell or keep for sale any dynamite, cartridges, bombs or other combustibles of like kind without having first obtained from the board of county commissioners of the county of such person's residence a license for that purpose.

GAME LAWS: REVOCATION OF LICENSE

21 October 1946

In all cases of conviction of violation of any provision of the North Carolina Game Laws, the same being Article 7 of Chapter 113 of the General Statutes of North Carolina, it is the duty of the court under the statute to require the surrender of any hunting license then held by the convicted defendant. It is the further duty of the court to forward such surrendered license to the State Department of Conservation and Development.

MUNICIPAL CORPORATIONS: LICENSE TAXES; SERVICE STATIONS

22 October 1946

One who sells automobile accessories, tires, tools, batteries, electrical equipment, radios for automobiles, motor fuels and lubricants, is engaged in operation of an automotive service station, and is subject not only to the State's graduated license tax, but to a license tax which may be imposed by the city or town in which such business is located, which latter tax may not, however, exceed one-fourth of the license tax levied by the State on similar service stations under like circumstances.

SCHOOLS: CITY ADMINISTRATIVE UNIT LYING IN MORE THAN ONE COUNTY;
PROPORTIONATE CONTRIBUTION BY COUNTIES TO COST OF
SCHOOL BUILDING SITE

24 October 1946

In cases where a city administrative school unit embraces parts of more than one county, the board of county commissioners of each such county would have authority to contribute a proportionate part of the cost of a school building and site located in only one county, title to such site to be taken in the name of the city administrative unit.

SOIL CONSERVATION DISTRICTS: TERM OF OFFICE OF DISTRICT SUPERVISORS

24 October 1946

Under our law, after the expiration of the first terms of the original appointees, the terms of all soil conservation district supervisors shall be for a period of three years.

SCHOOLS: USE OF SURPLUS FUNDS FOR ERECTING AND EQUIPPING
SCHOOL BUILDINGS

28 October 1946

The erection and equipping of adequate school buildings for constitutional school term is a necessary governmental expense and any available surplus funds may be used for such purpose without a vote of the people. Furthermore, our statutes make it mandatory that the several boards of county commissioners make adequate provisions for the erection, maintenance and equipment of such school buildings.

SCHOOLS: BOARD OF COUNTY COMMISSIONERS DETERMINES NECESSITY FOR
SCHOOL BUILDINGS; CITY ADMINISTRATIVE UNIT MAY SELECT
SITE WITHIN UNIT

30 October 1946

The board of county commissioners has final authority to determine the question of the necessity for a proposed school building in either a county or a city administrative school unit, but the governing body of a city administrative school unit has final authority to select the site for a proposed school building within the city administrative school unit.

CRIMINAL LAW: CARRYING CONCEALED WEAPON; DEFECTIVE PISTOL

4 November 1946

A broken or defective pistol is still a pistol within the meaning of our statutes prohibiting the carrying of concealed weapons.

MUNICIPALITIES: APPLICATION OF TAXES TO PURPOSE FOR WHICH LEVIED

7 November 1946

Our County Fiscal Control Act provides that no appropriation made by an appropriation resolution, except an appropriation for general county (or city) expenses, shall be transferred from one fund to another fund, and no appropriation for general county expenses shall be transferred to any fund of any subdivision of the county, or vice versa.

ELECTION LAWS: TIME FOR HOLDING A.B.C. ELECTIONS

7 November 1946

In elections for establishing A.B.C. stores, the registration books must remain open for the same period as required for a regular election. This being so, the registration books must be opened on the fourth Saturday

preceding the election. It is also required that the county board of elections shall give at least twenty days' notice of an A.B.C. election prior to the opening of the registration books, and that no such election shall be held within sixty days of any biennial election for county officers.

TAXATION: LIENS; CERTIFICATE OF TAX LIABILITY

12 November 1946

In the absence of express provisions such as are found in our inheritance and sales tax schedules of the Revenue Act, the State Commissioner of Revenue does not acquire any lien upon lands of a taxpayer until the docketing of a certificate of tax liability.

MUNICIPAL CORPORATIONS: NECESSARY EXPENSE; CONSTRUCTING ATHLETIC FIELD

12 November 1946

The construction and equipment of athletic fields not being classed as a necessary public expense, municipal bonds to finance such a project cannot lawfully be issued without a vote of the people.

GAME LAWS: LICENSES—BY WHOM REQUIRED

12 November 1946

Owners, lessees, tenant farmers and sharecroppers are not required to obtain hunting licenses for hunting on the premises owned or farmed by them, but this exemption does not apply to hired hands working for wages.

SCHOOLS: ACQUISITION OF SCHOOL SITES BY CONDEMNATION

15 November 1946

Under our statutes, whenever a county board of education or the board of trustees of any city administrative school unit are unable to acquire a suitable school site by gift or purchase, such board, by following the procedure set forth in our statutes, may acquire a suitable school site by condemnation.

COMMISSIONER OF PUBLIC TRUST PROHIBITED FROM CONTRACTING FOR OWN BENEFIT

15 November 1946

A county commissioner who sells or furnishes surety bonds to county employees violates our statutory prohibition against a commissioner of a public trust contracting for his own benefit.

MUNICIPAL CORPORATIONS: LIABILITY OF PUBLIC PROPERTY FOR STREET IMPROVEMENT ASSESSMENTS

16 November 1946

A municipal corporation may assess public property, other than state-owned property, for its proportionate part of the cost of permanent street and sidewalk improvements, and such property is legally liable therefor.

SCHOOLS: MENTALLY DEFECTIVE PUPILS; DISMISSAL

21 November 1946

Our statutes provide procedure by which the local school authorities may exclude mentally defective children from attendance at a public school, upon it appearing that such child could not benefit from the regular course of instruction, and that its presence would disturb the other pupils.

JUSTICE OF THE PEACE: OFFICIAL BOND

21 November 1946

We have no state-wide statute requiring a justice of the peace to give an official bond.

NOTARY PUBLIC: JURISDICTION STATE-WIDE

21 November 1946

The territorial jurisdiction of a notary public is state-wide in North Carolina.

MUNICIPAL CORPORATIONS: FURNISHING WATER TO OUT-OF-TOWN CUSTOMERS

21 November 1946

Under our statutes, municipal corporations have authority to own and operate their water systems, and to furnish water not only to their own citizens, but to persons, firms or corporations outside the corporate limits, where the service is available.

ATTORNEYS AT LAW: NOTARIES PUBLIC

21 November 1946

A notary public, as such, may not legally write deeds, leases or other legal papers, or perform any other legal services of an attorney at law, regardless of whether or not any fee is charged for such service.

STREET IMPROVEMENT ASSESSMENTS: STATE-OWNED PROPERTY

23 November 1946

In North Carolina, State-owned property is not subject to a lien for street improvement assessments.

MUNICIPAL BONDS: STATUTE OF LIMITATION

26 November 1946

Under our statutes of limitation, an action on a municipal bond is barred after ten years from the maturity of such bond, and the circumstance that the municipality did not have funds to make payment during the ten-year period would not suspend the running of the statute.

CRIMINAL LAW: CONCEALED WEAPONS

30 November 1946

Under our statutes and decisions, a person carrying a blackjack or slung-shot concealed about his person, when off his own premises, is guilty of carrying a concealed weapon.

MUNICIPAL CORPORATIONS: LIABILITY FOR TORTS OF POLICE OFFICERS

2 December 1946

A municipal corporation is not liable for the torts of its police officers committed while in the performance of their duties as law enforcement officers.

LOCAL SCHOOL SUPPLEMENTS: EFFECT OF MORE THAN ONE ELECTION

4 December 1946

Our statutes authorizing the calling of elections on the question of local school supplements do not undertake to limit the number of such elections that may be held; on the contrary, the language of the statutes definitely indicates that the likelihood of a series of such elections was contemplated.

CRIMINAL LAW: ABANDONMENT OF CHILDREN BY MOTHER;
CONTINUING OFFENSE

5 December 1946

In this State, the crime of wilful abandonment of children by their mother is not a continuing offense, day by day, and in a case where a mother has been tried and acquitted on such a charge, a plea of former jeopardy would be in order.

MOTOR VEHICLES: STORAGE LIENS; DISPOSING OF PROCEEDS OF SALE

6 December 1946

The holder of a storage lien on a motor vehicle is entitled to satisfy his charges for storage, notice, advertisement and other expenses of sale out of the proceeds of such sale. Any balance of such proceeds of sale should be held by the lien holder for delivery to the person entitled to receive the motor vehicle had no sale been necessary, but in case no claim is made for such balance within ten days of the sale, it is to be delivered to the clerk of Superior Court of the county in which the sale was held and if still unclaimed after twelve months, it shall escheat to the University of North Carolina.

SPECIAL PROCEEDINGS: EX PARTE PROCEEDING FOR PARTITION—INFANTS;
REPRESENTATION BY GENERAL GUARDIAN OR NEXT FRIEND

6 December 1946

Under our law, where land is ordered sold for partition in an ex parte special proceeding and there are minor heirs involved, such heirs may be represented either by a general guardian or by a next friend.

MUNICIPALITIES: CLOSING STREETS; DAMAGES

7 December 1946

Notwithstanding the authority granted by the general law to a municipality to close a street, the municipality would be liable to abutting property owners for any special damages caused by such closing.

PUBLIC SCHOOL BUILDINGS: CARE AND INSPECTION

9 December 1946

County boards of education and the trustees of city administrative units, as the case may be, are charged with the care and inspection of their public school buildings; this is not a duty of boards of county commissioners.

MUNICIPAL TAXATION: CHAIN BANKS; THEATERS PRIVILEGE TAX

10 December 1946

Our statutes authorizing municipal corporations to levy a privilege tax on trades, professions and franchises, is a sufficient grant of authority to sustain the imposition of a reasonable privilege tax on a branch bank, or upon a theater operating within the municipality.

COUNTIES: LIABILITY OF COUNTY FOR HOSPITAL AND MEDICAL EXPENSE
OF PRISONER INJURED WHILE UNDER ARREST

12 December 1946

Upon a finding by a jury that such charges are reasonable, a county is liable for the hospital and medical expenses of a prisoner injured while resisting arrest, in a case where such injured prisoner was taken to the hospital by an officer. The arresting officer would not, however, be personally liable, in the absence of a specific promise to pay.

COUNTIES: POOL ROOMS; ISSUANCE AND REVOCATION OF LICENSES

13 December 1946

Under our statutes, the Commissioner of Revenue is required to issue a State license for the operation of a pool room where proper application and payment of license fees have been made; however, after the issuance of such State license, it is further mandatory upon the Commissioner of Revenue to revoke it, upon receipt of a resolution by a board of county commissioners requesting the revocation of the license of any pool room within the county but located outside the corporate limits of any town.

VITAL STATISTICS: REGISTRATION OF FOREIGN BORN CHILDREN HAVING
AMERICAN CITIZEN AS FATHER; REGISTRATION OF FOREIGN MARRIAGE

13 December 1946

Our Bureau of Vital Statistics has no authority to register the birth of any child born outside of North Carolina. Neither is there any authority for the recording in this State of a marriage performed in another state or in a foreign country.

INHERITANCE TAXATION: LEGACIES TO CHARITABLE INSTITUTIONS
ORGANIZED UNDER THE LAWS OF OTHER STATES

16 December 1946

North Carolina exempts from inheritance taxation property of a resident decedent passing to charitable corporations created under the laws of another state, if the state of the recipient corporation grants a similar reciprocal exemption.

MOTOR VEHICLE: LIENS; REGISTRATION AND RECORDATION

17 December 1946

In North Carolina, a lien on a motor vehicle is sufficiently recorded if it is recorded in the office of the register of deeds of the county in which the owner of the motor vehicle resides.

MOTOR VEHICLES: CHAUFFEURS; LICENSES

18 December 1946

The driver of a delivery truck, employed regularly in the delivery of goods or commodities for a business concern is not a "chauffeur" within the meaning of our motor vehicle law, and is only required to hold a regular motor vehicle operator's license.

MARRIAGE: CERTIFICATES, WHERE RECORDED

20 December 1946

Under North Carolina law, marriage certificates are required to be recorded in the office of the register of deeds of the county in which such marriage takes place.

MUNICIPALITIES: PAVING ASSESSMENTS; LIENS—WHAT PROPERTY COVERED

30 December 1946

Under our statutes, paving assessments constitute a lien on the real property against which such assessments are made, and our statutes further provide that such assessments shall be laid upon the lots and parcels of land abutting directly on the improvements. Consequently, once it is determined that a particular property constitutes one lot or parcel of land, such lien would attach to such property for its entire depth.

MUNICIPAL CORPORATIONS: PUBLIC NUISANCES; PUBLIC HEALTH

30 December 1946

Our statutes give to municipal corporations broad authority and power to remove or abate any condition within the corporate limits or within a mile of such limits which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person responsible for such condition, and if not paid, shall constitute a lien against the property where such condition exists, and shall be collectible in the same manner as unpaid taxes.

SCHOOLS: SMOKING BY STUDENTS

2 January 1947

A county board of education has authority to prohibit smoking by students on the school grounds, and in the school buildings.

MAGISTRATES: TERRITORIAL JURISDICTION

9 January 1947

A magistrate can hold court anywhere in his county, but cannot be compelled to hold court out of his township.

ATTORNEYS AT LAW: CORPORATIONS; PRACTICE OF LAW

10 January 1947

Our statutes make it unlawful for a corporation to practice law.

SLOT MACHINES: PIN BALL MACHINES

11 January 1947

It is unlawful in North Carolina to operate any pin ball slot machine on which varying scores may be made, regardless of whether such machines pay off in coin or otherwise.

TAXATION: COUNTY; LISTING OF LAND LYING IN MORE THAN ONE COUNTY

13 January 1947

Our statutes require that all real property subject to taxation shall be listed in the township or place where such property is located.

INDECENT LANGUAGE

16 January 1947

Under our statutes, it is unlawful to use profane or indecent language on a passenger train, or to a female telephone operator over a telephone, or to use such language on a public highway. Further, profane language boisterously repeated in a public place is indictable as a common nuisance.

TAXATION: EXEMPTION OF AUTOMOBILES PROVIDED BY VETERANS
ADMINISTRATION TO AMPUTEE VETERAN

16 January 1947

An automobile furnished by the Veterans Administration to an amputee veteran is exempt from ad valorem taxation in North Carolina.

WATER MAINS: GAS OR SEWER MAINS; COST OF
CONSTRUCTION AND CONNECTIONS

17 January 1947

Although our statutes provide that the entire cost of making connections with water, gas or sewer mains shall be borne by the owners of the property served by such connection, we have no statutory authority for assessing against the abutting property owners the cost of the actual construction of such water, gas or sewer mains.

GAME LAWS: ILLEGAL DEVICES

22 January 1947

The use of electric flash lights or spot lights in the hunting or taking of deer in North Carolina is illegal, and where such lights are attached to an automobile which transports the hunter engaged in such illegal hunting, and the power for the light is supplied by the automobile, then not only the lighting devices but the automobile itself would be subject to confiscation.

SCHOOLS: ISSUANCE OF BONDS BY SCHOOL DISTRICTS

25 January 1947

In the absence of special legislative authority, a county public school unit cannot legally hold an election for the issuance of bonds to be used for the improvement of the school plant of the unit, unless such county is specifically included under what is known as the Cleveland County Act or under the provisions of what is known as the Buncombe County Act.

TAXATION: REFUND OF POLL TAX TO DISABLED VETERAN

27 January 1947

A board of county commissioners, upon finding that a blind and disabled veteran had paid poll tax for a two-year period during such disability, may lawfully refund the amount of such payment.

PHYSICIANS: REVOCATION OF LICENSE BY COURT; DUTY OF STATE BOARD OF
MEDICAL EXAMINERS TO REVOKE UPON CONVICTION OF FELONY

29 January 1947

There is no statutory authority under which a superior court judge can revoke a license granted a physician by the State Board of Medical Examiners, although the court might suspend judgment upon condition that the convicted defendant should not thereafter engage in the practice of medicine.

Further, it is incumbent upon the board to require a physician convicted of a felony to appear and show cause why the State Board itself should not revoke the license.

MOTOR VEHICLE LAW: REVOCATION OF LICENSE; REINSTATEMENT
IN CASE OF PARDON

1 February 1947

The granting of a pardon by the Governor is no grounds for the reinstatement of a driver's license which has been revoked under our motor vehicle laws.

MUNICIPAL CORPORATIONS: NECESSARY EXPENSES;
INSTALLATION OF TOWN CLOCK

1 February 1947

The cost of installation of a town clock is not a public or a necessary expense for which public funds could be legally expended, except in cases where the clock is installed in some municipally owned building as a part of such building and for the convenience of city officers and employees in the discharge of their public duties.

SCHOOL LAW: BUS DRIVERS; SCHOOL MACHINERY ACT

1 February 1947

The conviction of a school bus driver of careless and reckless driving does not in itself deprive such driver of the right to drive a school bus, unless his State driver's license is revoked or suspended as a consequence of such conviction.

In the absence of such revocation or suspension, the question of retaining or discharging such driver is one for the principal and superintendent of the school, subject to the approval of the school committeemen or trustees of such school.

COUNTIES: ATTORNEY; COMPENSATION FOR APPEARING IN SUPERIOR COURT

3 February 1947

In the absence of a public-local act to the contrary, a county attorney who represents the county in the Superior Court at the request of the chairman of the board of county commissioners, is entitled to reasonable payment for his services out of the general fund of the county.

DEPUTY CLERKS OF SUPERIOR COURT: AUTHORITY TO TAKE
ACKNOWLEDGMENTS AND PASS UPON PROBATES

Our statutes and controlling decisions expressly recognize the authority of a deputy clerk of the Superior Court, in his own name and official capacity, to take acknowledgments of instruments entitled to registration. Our statutes also expressly confer upon a deputy clerk of the Superior Court the authority to pass upon the sufficiency of probates had before any official other than a clerk or deputy clerk of the Superior Court. This corrects an erroneous opinion recently digested.

MUNICIPALITIES: NECESSARY EXPENSES; BOND ISSUE; FACILITIES
PROVIDED OUTSIDE CORPORATE LIMITS

3 February 1947

Upon a finding by the governing body of a municipality that the erection of a water tank is necessary for the municipality, bonds for such purpose could be issued without a vote of the people, but subject to the debt limitation imposed by Article V, Section 4, of our State Constitution.

However, the cost of erecting a water tank for the purpose of serving persons living outside the corporate limits would not be a necessary public expense, and before bonds could be issued, a vote of the people would be required.

SCHOOLS: APPOINTMENT OF LOCAL COMMITTEE; INCREASING NUMBER

3 March 1947

Our statutes require the various county boards of education, biennially during the month of April or as soon thereafter as practicable, to appoint a local school committee for each of the several school districts in the respective counties, each committee to consist of not less than three nor more than five members, with terms of two years each.

Once these appointments are made, there is no authority for increasing the membership of any such committee, although the county board of education is authorized to fill such vacancies as may occur on such committees.

ELECTION LAW: ABSENTEE VOTING IN SPECIAL ELECTION

8 February 1947

Under our law, absentee voting is not permissible in a special election.

JURORS: FEES; MILEAGE

10 February 1947

Our statutes provide that jurors shall receive mileage at the rate of five cents per mile "while coming to the county seat and returning home," which has been construed to mean only one round trip during the week for which they have been called to serve.

J. P.S: AUTHORITY TO DELEGATE A PRIVATE CITIZEN TO
SERVE PROCESS OR MAKE ARREST

10 February 1947

Under our law, in extraordinary cases where a regular officer is not available, a justice of the peace may direct any disinterested person to serve or execute any legal process, and the person so directed shall be obliged to serve or execute such process, and shall be liable to the same penalties upon failure to act as would apply to a constable under like circumstances.

However, our courts have held that the statutes do not contemplate the appointment of special constables except in extraordinary cases, and that justices of the peace have no authority to deputize a special officer to serve process in a civil action.

NOTARY PUBLIC: MARRIAGE CEREMONY

February 1947

Under North Carolina law, a notary public has no authority to perform a marriage ceremony.

MUNICIPALITIES: DIFFERENTIALS IN TAX RATES

14 February 1947

A municipality cannot legally allow tax differentials within its corporate limits, as our State Constitution provides that taxes shall be uniform as to each class of property taxed, and our courts have held that a municipality cannot be zoned for the purpose of applying different tax rates in different zones.

MUNICIPALITIES: ACQUISITION OF FACILITIES IN NEWLY ANNEXED TERRITORY

14 February 1947

An act of the legislature providing for the extension of corporate limits could also authorize the municipality to acquire by purchase at a reasonable price public utilities previously installed in the newly annexed territory.

AD VALOREM TAXATION: VALUATION BY MUNICIPAL CORPORATION

14 February 1947

In the absence of public-local or special statutes to the contrary, a city or town not situated in more than one county must accept the ad valorem tax valuations fixed by the county authorities.

SCHOOLS: ELECTION OF COUNTY SUPERINTENDENT BY POPULAR VOTE

15 February 1947

County superintendents of schools are elected biennially by the county board of education, and there is no authority by which such superintendent can be elected by popular vote.

SCHOOLS: COMPULSORY ATTENDANCE LAW

15 February 1947

Our school law requires that every parent, guardian or other person in this State having charge or control of a child between the ages of seven and sixteen years shall cause such child to attend school, and any such person wilfully failing to compel such child to attend school is subject to prosecution, fine, and imprisonment.

CRIMINAL LAW: NOL PROS; NOL PROS WITH LEAVE

18 February 1947

A nol pros is not an acquittal, and the fact that a nol pros has been taken in a criminal proceeding does not prevent the re-opening of the case, or the issuance of a new warrant or bill of indictment. Where a nol pros with leave was taken, the solicitor may re-open the case upon his own initiative, and in other cases of nol pros, a motion to re-open by the solicitor, followed by an order by the judge, will reinstate the proceedings.

SCHOOLS: TEACHING OF THE BIBLE AT PUBLIC EXPENSE

24 February 1947

There is no constitutional or statutory prohibition against teaching the Bible in our public schools, nor is there any law which would prevent the use of public money for the purpose of making elective courses in Bible study available in the same manner as other courses of instruction in the public schools.

TAXATION: REVALUATION OF REAL ESTATE NOT APPLICABLE TO
HORIZONTAL INCREASE OF VALUES OF PERSONAL PROPERTY

26 February 1947

Our statute providing for horizontal increase or decrease in tax valuation is applicable only to real estate. Personal property must be valued for tax purposes in the year in which it is taxed.

VETERANS: CITIZENSHIP; DISCHARGE OTHER THAN HONORABLE

27 February 1947

The fact that a former member of our armed forces received a discharge other than honorable therefrom does not deprive him of his citizenship in North Carolina.

LICENSE TAXATION: ASTROLOGERS; MUNICIPAL CORPORATIONS

28 February 1947

A person who holds himself out to the public, by advertisement through the press and over the radio, as being able to give astrological readings and answers by mail in response to written requests therefor, is liable to a tax in a reasonable amount imposed by municipal ordinance upon "fortune tellers, clairvoyants, and similar trades." The fact that the radio broadcast may partake of the nature of interstate commerce does not invalidate the ordinance.

RABIES ACT: APPOINTMENT AND QUALIFICATIONS OF RABIES INSPECTOR

27 February 1947

As a matter of public policy preference should be given graduate veterinarians in the appointment of rabies inspectors, but, if such graduates are not available, any other person may be appointed who possesses the necessary ability and experience.

INEBRIATES: COMMITMENT TO STATE HOSPITAL; APPEAL

5 March 1947

Our statutes make no provision for an appeal from the judgment of a clerk of the Superior Court committing an inebriate to the State Hospital for treatment.

FIDUCIARIES: CLERKS OF SUPERIOR COURT; GUARDIANS; BOND REQUIREMENTS

5 March 1947

In cases where a guardian is a corporation created under an Act of Congress which exempts such corporation from the necessity of giving bond before acting in a fiduciary capacity, a clerk of our Superior Court would be justified in ordering the transfer of funds or other property to such corporation acting as guardian, without requiring a guardian's bond, even though the guardian was located in another state.

JUVENILE COURTS: JURISDICTION OVER ADULTS; NEGLECT OF CHILDREN BY PARENTS

6 March 1947

Our juvenile courts are given jurisdiction over persons under 16 years of age by express provision of the statutes, and this jurisdiction does not extend to persons beyond the age of 16. Consequently, a juvenile court would have no authority to try a parent beyond the age of 16 on a charge of neglecting children.

LICENSE TAXATION: TRADING STAMPS

8 March 1947

The issuance of trading stamps is not prohibited by statute in North Carolina, but if such stamps are used in the drawing or awarding of prizes or awards, or in connection with a lottery, then their manufacture, storage, use or possession is illegal in this State.

TAXATION: AD VALOREM; COTTON STORED IN BONDED WAREHOUSE

10 March 1947

Property stored in public warehouses, such as cotton, is required to be listed for ad valorem taxation in the county in which it is stored, rather than in the county in which the owner resides.

MUNICIPAL CORPORATIONS: CONSTITUTIONAL LAW; NECESSARY
EXPENSES; WATER WORKS AND SEWER

11 March 1947

While it is true that the cost of an adequate water supply and sewer system are necessary municipal expenses which may be incurred without a vote of the people, our State Constitution limits the amount of indebtedness which may be incurred by a municipality to an amount not exceeding two-thirds of the amount by which the outstanding indebtedness of the particular municipality has been reduced during the last preceding fiscal year, unless the question of such further increase be approved by the vote of a majority of those voting in such election.

POLL TAX: EXEMPTIONS; VETERANS; PENALTY AND INTEREST

11 March 1947

Our statutes specifically provide that any poll tax which a veteran was required to list prior to induction into the armed forces of the United States, and which has not been paid, shall be cancelled. It is further provided that all such members of the armed forces are exempt from poll taxes during the existing state of war.

MUNICIPALITIES: EXEMPTING NEW ENTERPRISES FROM TAXATION;
WATER AND LIGHT CHARGES

12 March 1947

Municipalities have no authority to exempt from taxation the property of any person, firm or corporation, except such property as is specifically exempt by law. Thus, it would not be lawful to remit or decrease the taxes of a new enterprise, or to make concessions as to water or light charges.

U. S. SAVINGS BONDS: WAR SAVINGS BONDS; USE OF COLLATERAL

13 March 1947

U. S. Savings Bonds (Series E) and War Savings Bonds (Series E) cannot properly be pledged or hypothecated in connection with furnishing personal bond, as these bonds are not negotiable.

MUNICIPAL ELECTIONS: RESIDENCE REQUIREMENT

14 March 1947

In order to vote in a municipal election, a person must be a resident of the municipality at the time the vote is cast. The removal from one precinct or ward to another within the same municipality does not deprive a person of the right to vote, but removal beyond the corporate limits with the intent to change residence, would disqualify the person offering to vote.

MUNICIPALITIES: RECREATIONAL PROJECTS; REVENUE FROM
NON-TAX SOURCES

17 March 1947

Our courts have held that funds derived from tax sources may not be spent in the operation of municipal parks or recreational facilities without the support of a vote of the people. This does not mean, however, that available funds from other than tax sources could not be used for recreational purposes, such as revenue derived from a municipal water or light and power department.

BANKS AND TRUST COMPANIES: FINAL ACCOUNTS FOR ESTATES

19 March 1947

A bank or trust company acting in a fiduciary capacity is authorized under our laws to transact the necessary clerical business incidental to the usual and routine administration and settlement of estates and trusts. The filing of accounts and reports, the offering of wills for probate in common form, and the like services performed without additional compensation will not be construed as constituting the unauthorized practice of law.

MUNICIPAL ORDINANCES: UPKEEP OF PRIVATE PREMISES

20 March 1947

A municipality may not by ordinance require the owner of private property to clean up his premises, unless the condition complained of amounts to a public nuisance.

COUNTIES: TAX FORECLOSURE CANCELS TAX LIEN

20 March 1947

When a county has exercised its right to foreclose a tax sale certificate and the property is bid in by a third party, the lien of the taxes is cancelled as to the foreclosed property.

CONTRACTORS: LICENSE; OWNER ACTING AS SUPERINTENDENT

21 March 1947

Under our general law, where the owner of a proposed building superintends the construction himself, he is entitled to have a building permit issued to him in his own name. However, if someone other than the owner superintends the project, then such person must meet the licensing requirements provided by law for contractors.

POSTAL LAWS: MAILING STATEMENT OF ACCOUNT ON POSTAL CARD

7 February 1947

While our state statutes do not undertake to prohibit the sending of statements of account by mail on postal cards, such practice is prohibited by the U. S. Postal laws.

REGISTER OF DEEDS: CORRECTION OF ERRORS

7 February 1947

A register of deeds is without authority to make any alterations or corrections in an instrument filed with his office for recordation.

MUNICIPAL TAXATION: DISCRIMINATION ON BASIS OF RESIDENCE

2 April 1947

A city or town may not legally levy a license tax which discriminates between residents and nonresidents of such city or town.

MUNICIPAL CORPORATIONS: ZONING ORDINANCES; NUISANCES

There are two ways in which a city or town may properly prevent the erection of wholesale oil or gasoline storage tanks in a residential district—first, by the adoption of a proper zoning ordinance; and, second, by treating the objectionable condition as a public nuisance.

TAXATION: REVALUATION; PERSONAL PROPERTY EXEMPTIONS

4 April 1947

Our general law provides that the real property in the several counties shall be revalued quadrennially by the county as a whole, and there is no provision for separate valuation by particular townships.

Our statutes also provide for one exemption of certain personal property of \$300.00 for the head of a household, and no one person can properly claim this exemption in more than one county in one tax period.

CRIMINAL LAW: DUELING

4 April 1947

Under our statutes it is unlawful to fight a duel, or to send, accept or bear a challenge to fight a duel, or to counsel, aid or abet the fighting of a duel. Further, in the event one party engaging in a duel is killed, the survivor, upon conviction, shall suffer death.

CORPORATIONS: DISSOLUTION

4 April 1947

Before a corporation can secure a certificate of dissolution from the Secretary of State, it must exhibit to him statements from the State Revenue Department showing that such corporation is not delinquent in its taxes.

PROBATES: ILLEGIBLE SIGNATURE OF PROBATING OFFICER

5 April 1947

In cases where the signature of the officer probating an instrument cannot be read, the clerk of the court to whom such instrument is tendered for recordation is justified in refusing to record it until the identity and qualifications of the probating officer can be determined.

MARRIAGE LICENSES: FEES

8 April 1947

A 1947 Act of our General Assembly authorizes counties to levy a tax of \$4.00 on each marriage license issued, this to be deposited in the general fund of the county.

In addition to this tax, a fee of \$1.00 is collected on each license issued, which \$1.00 is to be retained by those Registers of Deeds who are on a fee basis or paid into the general fund of the county if the Register of Deeds is on a salary basis.

DIVORCE: RESIDENCE REQUIREMENTS

8 April 1947

Under our statutes, absolute divorce may be obtained upon application of either party when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit has resided in this State for a period of at least six months immediately preceding the filing of the complaint.

MOTOR VEHICLES: DEFECTIVE BRAKES; LIABILITY OF
OWNER PERMITTING OPERATION

8 April 1947

The owner of a motor vehicle with defective brakes who knowingly permits another to operate such motor vehicle is guilty of a criminal offense in cases where the defective condition is such that the owner's operation of such vehicle would have been unlawful.

TAXATION: TANGIBLE PERSONAL PROPERTY IN TRANSIT

9 April 1947

Our statutes require that tangible personal property of a corporation shall be listed for taxation in the county of its residence, and the circumstance that such property owned by a corporation is in transit and has not reached the county of residence at listing time does not affect its taxability.

A.B.C. ELECTIONS: PETITION; PUBLIC RECORD; INSPECTION

10 April 1947

Petitions calling for an election on the question of A.B.C. stores become public records upon being filed, and the person having legal custody of such petitions should make them available for public inspection at all reasonable times, which would ordinarily mean during usual business hours.

ELECTIONS: ERRORS ON REGISTRATION BOOK AS AFFECTING
ELIGIBILITY OF ELECTOR

10 April 1947

If an elector is otherwise properly qualified and registered, an error in the statement of his age on the registration book would not serve to disqualify him.

MOTOR VEHICLES: SALE OF AUTOMOBILE CONFISCATED FOR
TRANSPORTATING LIQUOR

14 April 1947

In the absence of a court order providing otherwise, the officer who has seized and has custody of an automobile confiscated for illegal transportation of liquor is the proper officer to conduct the sale and dispose of the proceeds in the manner provided by law.

SPECIAL ELECTIONS: INTOXICATING LIQUORS; COUNTIES

16 April 1947

Our 1947 General Assembly made no changes in respect to the form or sufficiency of a petition calling for an election upon the question of the sale of intoxicating liquor in the counties of the State, but it did provide for the filling of petitions upon the question of the sale of wines and beer, and before any elections on wine or beer can properly be called, the procedure contained in the 1947 Act must be observed. One provision of this Act is to the effect that no such election can be called within one hundred sixty days of the effective date of the Act, which is July 1, 1947.

INHERITANCE TAXATION: WAR BONDS

17 March 1947

Where a War Bond is payable to husband and wife, and the husband dies, the bond is subject to inheritance taxation to the extent it was purchased with the husband's money, and this liability is not affected by the fact that under Federal law the complete ownership of the bond may be in the wife, to the exclusion of the husband's estate.

LICENSE TAXATION: DISABLED VETERANS

15 March 1947

There is no North Carolina statute which generally exempts disabled war veterans from the payment of license taxes,

INCOME TAXATION: FOREIGN CORPORATIONS; SUBSIDIARY
CORPORATIONS

24 March 1947

Under certain circumstances, a foreign corporation is required by North Carolina's income tax laws to include in its total taxable income (part of which is allocated by statutory formula for taxation in this State) dividends received from stock in its subsidiaries. However, in such event, the foreign corporation may not determine the allocation percentage by using any of the subsidiaries' sales, property, costs, or receipts.

INHERITANCE TAXATION: REMAINDER IN REAL ESTATE

22 March 1947

When a person dies seized of a vested remainder in real estate, such remainder is subject to inheritance tax under our law, and its value is determined by first computing the value of the preceding life estate under the mortuary and annuity tables, on the basis of an annuity of 6%, and then subtracting the value of such life estate from the entire value of the real estate.

INHERITANCE TAXATION: SAFETY DEPOSIT BOXES; CO-TENANTS;
ACCESS BY CLERK OF COURT

21 April 1947

Our statutes specifically provide that the clerk of the Superior Court shall be present when a safety deposit box of a decedent is opened, even though it be opened by a co-tenant or co-owner, and a failure to meet this requirement makes the bank or safe deposit company liable for inheritance taxes due on the contents of such box.

MUNICIPAL CORPORATIONS: SCHOOL PROPERTY; LIABILITY FOR
STREET PAVING ASSESSMENTS

28 April 1947

Under North Carolina law, public school property is liable for improvement assessments made by a city or town.

PROCESS TAX: LAW ENFORCEMENT OFFICERS' FUND

10 April 1947

The \$2.00 item of cost assessed in every criminal case for the Law Enforcement Officers' Benefit and Retirement Fund is separate and distinct from the \$2.00 process tax collected for the account of the Commissioner of Revenue, and both items are to be collected as additional costs in every criminal case finally disposed of in the Superior Court.

PLUMBING AND HEATING: LICENSING ACT; APPLICATION TO PLUMBERS
EMPLOYED ON SALARY BASIS BY EDUCATIONAL INSTITUTION

6 May 1947

Plumbers or plumber mechanics employed on a salary basis by an educational institution do not thereby come within the provisions of our statutes

requiring licenses of persons engaged in the plumbing and heating contracting business. Neither does this licensing law for plumbing and heating contractors apply to a property owner who purchases plumbing and heating materials for installation by himself on his own premises only, provided he is not otherwise subject to such license requirements.

A.B.C. ACT: BEER AND WINE LICENSES; CONVICTION OF
PROHIBITION LAW VIOLATIONS

6 May 1947

No license for the sale of wine and beer can be legally issued by a board of county commissioners to an applicant who has been convicted of violating our prohibition laws, until at least two years have passed since such conviction.

BUILDING AND LOAN ASSOCIATIONS: TRUSTEES; OFFICERS AND
ATTORNEYS OF ASSOCIATION

1 May 1947

Under our State law, an officer of a building and loan association cannot legally serve as trustee under a deed of trust executed in favor of such association. However, there is no legal prohibition against an attorney of such association acting as trustee under such a deed of trust.

GASOLINE TAXATION: EXEMPTIONS; SERVICE TRUCKS AND GASOLINE
DELIVERY WAGONS USED ONLY FOR SCHOOL PURPOSES

6 May 1947

Gasoline sold to county boards of education for use in school transportation in school buses, service trucks and gasoline delivery trucks for school purposes only is exempted by statute from the 6c per gallon tax levied on sales of gasoline.

TAXATION: TRUSTEES, COMMISSIONERS, ETC., LIABILITY LIMITED TO TAX
ASSESSED AND LEVIED AT TIME OF SALE

7 May 1947

In conducting sales of land under judgment of court, trustees and commissioners are required to pay out of the proceeds of sale only such taxes as have been assessed and levied against the property at the time of sale.

SCHOOLS: GROUNDS FOR REFUSAL OF ELECTION OF PRINCIPAL OR TEACHER

7 May 1947

A county board of education is not required by law to give the grounds for refusing to approve the election of a principal or teacher in the public schools.

TAXATION: DISCOVERY OF UNLISTED PROPERTY; BACK-LISTING

7 May 1947

A purchaser of property is not required to verify the correctness of its listing on the tax records, and is not chargeable with additional tax on account of an erroneous description in listing made prior to the purchase.

However, where a taxpayer actually owns two lots and lists only one, the omission may be cured by back-listing, and the additional tax assessed, although the lots may adjoin one another.

AMERICAN LEGION: SALE OF WINE AND BEER AT POST

8 May 1947

If otherwise eligible and qualified, there is no legal reason why a license to sell beer and wine should not be issued to a post of the American Legion. However, the fact that Legion club rooms are open only to members and their guests cannot prevent the proper inspection by law enforcement officers of Legion premises where beer and wine is sold.

MUNICIPAL CORPORATIONS: TAXICAB ORDINANCES; PROVISION FOR
MAINTENANCE OF TAXI STANDS

8 May 1947

While a city or town may not legally prohibit the parking of taxicabs upon its streets absolutely, it may by proper ordinance reasonably regulate such parking, by requiring that taxicabs use only designated spaces as taxi stands.

CORONERS: HIGHWAY ACCIDENTS; REMOVAL OF BODIES BY OFFICERS

8 May 1947

A State highway patrolman has authority to remove or have removed to a funeral home or morgue the body of a person killed on the highway, except in cases where it appears that the victim probably met death by reason of some criminal act or default, in which cases the coroner is required to hold an inquest before removal of the body. In this same connection, a highway patrolman is without authority to sign a death certificate.

MOTOR VEHICLES: REVOCATION OF DRIVER'S LICENSE UPON
CONVICTION IN ANOTHER STATE

8 May 1947

The Department of Motor Vehicles may exercise its discretion on the question of whether or not it should take any action upon receiving notice that the holder of a North Carolina driver's license has been convicted of an offense which would be grounds for suspension or revocation of license in North Carolina. However, if the department takes any action at all, it

must proceed as if the foreign conviction had taken place within this State, and must suspend or revoke in accordance with the provisions of our own statutes governing similar cases.

NOTARIES PUBLIC: ADMINISTRATION OF APPEAL OATHS

9 May 1947

Under our law, notaries public have no general authority to administer oaths and affirmations. Consequently, the officials of a municipality may not properly take the oath of office before a notary public.

COUNTIES: EMPLOYMENT OF ATTORNEYS

13 May 1947

A board of county commissioners is clearly within its rights in employing attorneys to represent the county in litigation or as advisory counsel or in appearances before boards or commissions, and the question of what constitutes proper compensation is one for the board to decide within its sound discretion. The term of employment should not, however, extend beyond the term of office of the county board of commissioners.

MUNICIPAL CORPORATIONS: CONTRIBUTIONS TO NATIONAL GUARD

13 May 1947

The 1947 Act of our General Assembly, creating the North Carolina Armory Commission, provides ample authority for the governing bodies of cities, towns and counties to make appropriations for the maintenance of any National Guard units.

PROHIBITION LAWS: PRIVATE SALE OF WHISKEY IN CLUBS

15 May 1947

Under no circumstances may whiskey legally be sold by the drink in a private club; neither may whiskey legally be owned by a club and sold in any quantity to its members.

WILLS: NO PROVISION FOR ONE CHILD; VALIDITY

15 May 1947

Under our statutes, the maker of a will may entirely exclude one or more of his children, and leave all his estate to one child, without affecting the validity of the will. Neither is it necessary that a will make some mention of each child in order for its provisions to be upheld.

However, if any children are born to the testator after the will is made, and no provision is made for such after-born children, through inadvertence or mistake, then the will is void as to those children, but valid in other respects.

SCHOOLS: SUBSTITUTE TEACHERS; COMPENSATION

15 May 1947

Our State Board of Education, in the proper exercise of its discretion, has adopted a regulation fixing the pay of substitute teachers in the public schools at \$5.00 per day. The only statutory limitation on this exercise of discretion is to the effect that this compensation shall not be less than \$3.00 per day.

INCOME TAXATION: TRUSTS; INCOME FROM CORPORATE DIVIDENDS IN HANDS OF BENEFICIARY TO WHOM DISTRIBUTABLE

15 May 1947

It is the intent of our statutes to tax trust income only once, and to divide this income between the trustee and the beneficiary, depending on whether it is distributed or distributable during the income year.

Thus, if income received by a beneficiary from a trust can be identified as a distribution, in the income year, of dividends received by the trustee from stock in a domestic corporation which pays to this State a tax on all its net income, then such distribution is deductible from gross income of the beneficiary, to the same extent as if it had remained in the hands of the trustee as non-distributable.

DESCENT AND DISTRIBUTION: HUSBAND DYING INTTESTATE LEAVING WIFE AND CHILDREN

16 May 1947

When a man dies without leaving a will, but with a wife and children surviving him, his real estate goes to his children in fee simple, subject to the widow's dower. This dower consists of the use of one-third of the husband's real property for life. The personal property in such case is divided equally among the widow and the children, the widow taking a child's part in addition to the \$500.00 year's support to which she is entitled under our statutes.

MUNICIPAL CORPORATIONS: LICENSE TAX ON DETECTIVES

16 May 1947

A municipal corporation has statutory authority in North Carolina to levy a license tax on private detectives; while the statute prescribes no limitation on such a tax, it must be reasonable in amount. An annual license tax of \$50.00 imposed by a municipal corporation on private detectives would not appear to be unreasonable.

MUNICIPAL CORPORATIONS: BEER AND WINE; ELECTIONS

19 May 1947

Cities or towns with a population in excess of 1,000 are authorized to hold elections on the question of the sale of beer or wine within such municipality, but the statute expressly provides that no such election may be held until a county-wide election has been held in which a majority of the votes are cast against the sale of wine or beer, or both, in such county.

MOTOR VEHICLES: FARM TRACTORS

20 May 1947

While certain farm tractors are exempt from our state registration and license requirements, this exemption applies only to such tractors as are used exclusively in hauling farm products, supplies and equipment from place to place on the same farm or from one farm to another, and does not apply to tractor-trailers or other vehicles used on the highways to transport products or supplies between town and farm.

MUNICIPAL CORPORATIONS: PRIVILEGE TAX ON JEWELERS

Our statutes authorize municipal corporations to levy privilege taxes upon all trades, professions and franchises, and this authority is broad enough to include a privilege tax on those engaged in the business of selling jewelry.

INCOME TAXATION: INCOME PRODUCING PROPERTY IN THIS STATE
OWNED BY NON-RESIDENT

20 May 1947

Any non-resident of this State who receives income from real property located in this State, is liable to this State for income tax thereon, unless such non-resident is taxable on such income by the state or country of his residence, in which event the taxpayer will be entitled to credit on his North Carolina tax account with such proportion of the tax payable by him to the state or country in which he resides, as his income subject to taxation in North Carolina bears to his entire income upon which the tax so payable to such other state or country was imposed. This credit will not be allowed, however, unless substantially similar reciprocal credits are allowed citizens of North Carolina in similar cases by the taxing authorities of the state or country in which such claimant of credit resides.

MOTOR VEHICLES: VIOLATIONS OF MOTOR VEHICLE LAWS; REPORTS

21 May 1947

Every court in North Carolina having jurisdiction of offenses against our motor vehicle laws is required by statute to report all convictions for such violations to the State Department of Motor Vehicles.

LICENSE TAXES: ENGINEERS—LICENSE IN FIRM NAME

21 May 1947

The statutes authorizing the levying of a privilege tax on certain professions, including that of civil and electrical engineers, provides that the licenses issued thereunder are personal privilege licenses, and cannot be issued in the name of a firm or a corporation. Therefore, each person who practices any such profession must secure an individual privilege license.

AIRCRAFT AND AVIATION FUEL TAX

21 May 1947

There is no particular or special tax on aircraft in North Carolina, and fuel to be used in aircraft is specifically exempted from our state tax on motor fuels.

SCHOOLS: BOARD OF EDUCATION

22 May 1947

There is no authority in this State for a member of a board of education to delegate his authority to a private citizen as proxy, and any attempted exercise of such delegated authority is void.

FIRE PROTECTION: HOTELS AND "BUILDINGS OF LIKE OCCUPANCY"

24 May 1947

The expression "hotel or other building of like occupancy," as used in our fire protection statutes, is broad enough to include not only regular hotels but other buildings, such as inns, tourist homes, "hometels" or the like, which are open to the public for transient or temporary occupancy, and are conducted in substantially the same manner as regular hotels. This language would not, however, include an ordinary boarding house, as the nature of the occupancy there differs materially from that of a hotel; and each inn, tourist home or homotel would have to be judged upon its own merits and in the light of the nature of the structure and the character of the occupancy.

MUNICIPAL CORPORATIONS: LIABILITY FOR STREET MAINTAINED BY STATE

26 May 1947

A city or town is not relieved of liability for defects in its streets by virtue of the fact that such defective street is part of the State highway system. Neither is there any statutory authority for the bringing of a suit against the State Highway and Public Works Commission by any person on account of injuries received while using a State highway.

CLERK SUPERIOR COURT: WITNESSES; COST OF SUBPOENAS
ISSUED BY ATTORNEY

27 May 1947

The fifteen cent fee allowed the clerk of the Superior Court for each person named in a civil subpoena is not chargeable when a subpoena in a civil action is issued by a litigant or his attorney. There is no authority for charging a fee in such cases.

CLERK OF COURT: JURY TAX

27 May 1947

A jury tax cannot be legally collected unless the jury was actually empaneled in the case.

INTERNATIONAL ¼-INCH LOG RULE

27 May 1947

Our statutes provide that the standard for determining the number of board feet in a tree or log shall be the so-called "International ¼-Inch Log Rule," but specifically provide that the buyer and seller may, nevertheless, agree upon the use of some other log rule in determining the number of board feet involved in their contract. It is further provided that the International ¼-Inch Log Rule shall not apply to contracts entered into prior to March 20, 1947, nor to the measure of damage in any action in tort.

PUBLIC WELFARE: COST OF ADMINISTRATION; COUNTY PARTICIPATION

29 May 1947

Our statutes authorize the various counties to levy the necessary taxes to take care of the expense of administering welfare programs, and, under this authority, the counties should proceed to carry out the expressed will of the Legislature and should levy the taxes necessary to meet their respective part of administering a public welfare program.

TORTS: STATE EMPLOYEES; LIABILITY INSURANCE

There is no provision in our law for the purchasing by the State of liability insurance on State-owned motor vehicles operated by State employees, as the State is not liable for the torts of its employees, they being personally liable.

MOTOR VEHICLES: REGISTRATION; CHATTEL MORTGAGES; EFFECT OF FAILURE TO NOTE MORTGAGE OF CERTIFICATE OF TITLE

30 May 1947

Under our law, it is not necessary to the validity of a chattel mortgage on a motor vehicle that the existence of the mortgage be noted on the certificate of registration of title under our motor vehicle law.

NON-STOCK CORPORATIONS: RIGHT TO CREATE UNDER NORTH CAROLINA LAW

30 May 1947

Our laws permit and authorize the organization of non-stock, non-profit corporations, and the by-laws of such a corporation might properly provide for the issuance of receipts to contributors, showing the amount of such contributions.

INTOXICATING BEVERAGES: TRANSPORTATION FOR SALE; RECKLESS DRIVING IN TWO OR MORE COUNTIES; VENUE

9 June 1947

Where a defendant charged with careless and reckless driving and transportation of intoxicating liquor for sale was pursued through portions of more than one county, the case should be tried in the county first obtaining jurisdiction of the case.

SALES AND USE TAXES: EXEMPTIONS; SALE OF FUEL OIL FOR
TOBACCO CURING

12 June 1947

Sales of fuel oil to be used in curing tobacco are subject to the North Carolina 3% sales tax. An amendment intended to grant such an exemption was defeated at the 1947 session of the General Assembly.

HEALTH CENTER: SPECIAL COUNTY TAX; ELECTION

12 June 1947

Under our general law, a special tax for the operation of a county health center must be approved by a majority of the qualified voters of the county in an election held for that purpose.

SCHOOLS: CONDEMNATION; PUBLICATION OF NOTICE

13 June 1947

In condemnation proceedings to acquire a school site, it is sufficient that notice to a non-resident owner of the property be published once a week for four weeks in a semi-weekly newspaper published in the county, rather than in each issue of the paper during all four weeks preceding the date of sale.

COUNTIES: AUTHORITY TO EXPEND MONEY FOR GARBAGE
COLLECTION AND REMOVAL

14 June 1947

We have no statutory authority by which a board of county commissioners can make an appropriation for the collection and disposal of garbage. The only method provided by statute for the handling of such a situation is through the creation of a sanitary district.

MUNICIPAL CORPORATIONS: TAXATIONS: TAXATION OF RADIO STATIONS

A municipal corporation may not legally impose a license or privilege tax on radio broadcasting stations, as such would be a direct tax on interstate commerce and consequently unconstitutional.

MUNICIPAL CORPORATIONS: TAXATION OF RADIO STATIONS;
JURISDICTION

20 June 1947

Our statutes require all State and local law enforcement officers, on seizing vehicles because of the unlawful transportation of intoxicating beverages therein, or on making arrests of persons on account of the same, to refer the case to the State court having jurisdiction; and further, it is a misdemeanor for any such officer to refer any such case to a Federal court.

ESTATES OF MISSING PERSONS: CLERKS SUPERIOR COURT; JURISDICTION

20 June 1947

In cases where a clerk of the Superior Court has received from an executor, administrator or collector any funds due a missing person who has not been heard of for seven years or more, the clerk is authorized by statute to distribute such funds among the next of kin of the missing person, in the manner set out in the statute.

MUNICIPAL CORPORATIONS: CHAIN STORE TAX

21 June 1947

Under our statutes, a city or town may levy a license tax not in excess of \$50.00 on chain or branch stores as such, but this limitation does not prevent such city or town from imposing upon such stores an additional merchants license tax to be collected from merchants generally.

SCHOOLS: LOCAL SUPPLEMENTS; ELECTION COSTS

1 July 1947

Our statutes provide that the expense of conducting local supplement elections in all school districts other than city administrative units shall be met by the county board of education out of current expense funds of the county, but that in all city administrative units, such expense shall be met by the board of trustees of such unit, out of its local tax funds.

DIVORCE: RESUMPTION OF MAIDEN NAME

1 July 1947

The right granted by our statutes to a divorcee to resume her maiden name is restricted to those who have been granted divorces in North Carolina by a North Carolina court.

CLERK SUPERIOR COURT: FAILURE OF EXECUTOR OR ADMINISTRATOR TO
FILE FINAL ACCOUNT; CONTEMPT

2 July 1947

Our statutes give clerks of the Superior Court authority to institute contempt proceedings against administrators or executors failing to file final accounts, and a clerk may, in his discretion, commit such a delinquent to jail until such final account is filed, or until the clerk, in his discretion, orders his release.

JUSTICES OF THE PEACE: VACANCIES; CLERK OF SUPERIOR COURT

7 July 1947

In North Carolina, original vacancies in the office of justice of the peace, occurring before qualification, are filled by the Governor for the unexpired term; all other vacancies in this office are filled by the clerk of the Superior Court of the county in which such vacancy occurs.

MUNICIPAL ORDINANCES: CURFEW ORDINANCES; CHILDREN OF SCHOOL AGE
IN MOVING PICTURE HOUSES DURING SCHOOL HOURS

7 July 1947

Local public school authorities are given power under our statutes to make rules and regulations for the governance and discipline of pupils within their districts, and there is no legal authority for a municipal ordinance which undertakes to impose a curfew on school children, or to prohibit their attendance at moving picture shows.

APPORTIONMENT OF FEDERAL ESTATE TAX

9 July 1947

There is no provision of our North Carolina law which requires that federal estate taxes be apportioned between the heirs and distributees of an estate, and as our statutes do require that the personal property of a person dying without leaving a will must be exhausted before real property can be subjected to claims against the estate, it sometimes happens that the distributees may be required to pay all of the Federal estate taxes, while the heirs pay none.

MUNICIPALITIES: DEBT LIMITATION; BONDS ISSUED DURING CURRENT YEAR

9 July 1947

In determining the amount of debt contracted in any fiscal year, for purposes of observing the constitutional debt limitation provisions, it is necessary to take into account the total amount of bonds issued during the fiscal year by the taxing unit, whether with or without the approval of the voters, excepting only such bonds as were issued to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, or tax anticipation notes not in excess of fifty per centum of the anticipated taxes for the fiscal year.

MUNICIPALITIES: PARKING METER REVENUE; APPLICATION

10 July 1947

There is no general authority in North Carolina which would justify using revenue from parking meters for the purpose of financing a recreational program. To the contrary, our statutes expressly provide that all such revenue shall be used exclusively in the regulation of traffic and parking.

MARRIAGE IN A FOREIGN STATE: LICENSE TO REMARRY IN N. C.

10 July 1947

Where it appears that a valid marriage exists under the laws of another state or country, the persons so married cannot lawfully obtain a North Carolina marriage license, for the reason that our statutes provide, among other things, that only unmarried persons may marry in North Carolina.

LEGAL ADVERTISEMENTS: BIDS ON PUBLICATION OF TAX NOTICES
NOT REQUIRED

14 July 1947

It is not necessary under our statutes that units of government should advertise and receive bids for the publication of delinquent tax lists and notices, as the statutes themselves limit the amount that newspapers may charge for such publication, prescribe the qualifications the newspaper must meet, and authorize the taxing units to enter into contracts for such publication.

CRIMINAL LAW: DRIVING HORSE-DRAWN VEHICLE ON HIGHWAY WHILE
UNDER INFLUENCE OF INTOXICATING LIQUOR

15 July 1947

It is a criminal offense under our statutes to operate a horse-drawn vehicle upon a public highway while under the influence of intoxicating liquor or narcotic drugs; and a wagon comes within the definition of a vehicle.

PUNCH BOARDS: SLOT MACHINES; CONFISCATION

18 July 1947

Our laws specifically provide for the seizure and destruction of illegal punch boards and slot machines by all law enforcement officers within their respective jurisdictions.

STATE BOARD OF PUBLIC WELFARE: OLD AGE ASSISTANCE;
SECRECY AS TO RECIPIENTS OF AID

21 July 1947

Our statutes forbid the disclosure of the identity of those who receive old age assistance, and any person, including public officials, disclosing such confidential information, would be subject to criminal indictment.

BEER AND WINE: MUNICIPAL LICENSE MUST BE OBTAINED BEFORE
COUNTY LICENSE IS GRANTED

22 July 1947

Before a State or county license can be granted to sell wine or beer within a city or town, the applicant must have obtained from the governing board of such city or town itself a municipal license for the sale of wine or beer.

TAXATION: CANCELLATION OF MUNICIPAL TAXES

22 July 1947

There is no statutory authority under which the governing body of a city or town may cancel municipal taxes which have been lawfully levied.

SCHOOL ELECTIONS: WHAT VOTE REQUIRED TO ISSUE BONDS
FOR NECESSARY EXPENSES

28 July 1947

In a school election upon the question of the issuance of bonds for necessary school expenses, a majority of the votes actually cast is sufficient to carry the election and authorize the bond issue.

SCHOOL SUPPLEMENTS: COUNTY COMMISSIONERS NOT COMPELLABLE TO
MAKE PROVISION FOR SUPPLEMENT

30 July 1947

A board of county commissioners cannot be compelled by law, upon request of a county board of education, with or without an election, to provide for school supplements, as approval of the budget, in whole or in part, is left in the hands of the board of county commissioners, that being the tax levying authority.

COUNTIES: EXECUTION BY WARRANTY DEEDS

30 July 1947

In the absence of special legislative authority, neither a county, a city or a town has any right to execute a warranty deed conveying real estate.

WORTHLESS CHECKS: AIDING AND ABETTING IN ISSUANCE

30 July 1947

Any person who procures another to issue a worthless check and put it in circulation, knowing it is worthless at the time, would be aiding and abetting in its issuance, and indictable and punishable as for a misdemeanor.

CRIMINAL PROCEDURE: RECORDER'S COURTS; WHO MAY ISSUE WARRANTS

1 August 1947

In the absence of a public-local statute to the contrary, clerks and deputy clerks of recorder's courts, or other courts inferior to our Superior Court (except courts of justices of the peace), may sign warrants issuing from such courts, and such warrants so signed would be valid process.

ARRESTS: AUTHORITY TO MAKE

4 August 1947

Under our statutes, law enforcement officers have the right to make arrests without a warrant in case of all criminal offenses committed in their presence. Where the offense is not committed in the presence of the arresting officer, a warrant is required before a lawful arrest can be made.

FIRE DEPARTMENTS: RESIDENCE REQUIREMENTS AS TO
CHIEF AND MEMBERS OTHER THAN CHIEF

4 August 1947

The chief of a fire department is a public officer, and as such is required to be a resident and an elector in the municipality in which he serves; the other members of a fire department are not, as such, public officers, and it is not required that they be residents or electors of the municipality in order to become municipal employees entitled to the protection of the Workmen's Compensation laws.

A.B.C. STORES: DAILY DEPOSIT LAW; SECURITY FOR COUNTY
A.B.C. BOARD DEPOSITS

4 August 1947

A.B.C. store funds should be deposited daily, and a depository bond should be required.

AD VALOREM TAXATION: INTEREST ON DELINQUENT PERSONAL PROPERTY TAX

5 August 1947

Our tax law provides that interest of 1% be added to unpaid personal property taxes on February 2 of the year following the levy, that the interest be increased to 2% on March 2, and that, thereafter, additional interest of $\frac{1}{2}$ of 1% be added on the second of each succeeding month until payment is made. The statutes also provide a schedule of discounts for prepayment of taxes as follows: When paid on or before July 1 of the year of levy, a discount of 2% is allowed; if paid during that July, 1 $\frac{1}{2}$ % discount; if during that August, 1%; if during that September, 1%; and if paid on or before the first of November, $\frac{1}{2}$ of 1%. The tax is payable at par on and after November 2, up to and including February 1 of the following year.

CORONERS: MILEAGE

5 August 1947

In the absence of a public-local act to the contrary, a coroner is not entitled to any mileage allowance; but he is entitled to his per diem compensation, regardless of whether a jury is summonsed and used.

JUSTICES OF THE PEACE: SERVICE OF WARRANT IN ANOTHER COUNTY;
NECESSITY OF ENDORSEMENT

6 August 1947

Before a criminal warrant issued by a justice of the peace can be legally served in a county other than the one in which it was issued, it must be endorsed by a justice of the peace of the county in which it is to be served.

MUNICIPAL CORPORATIONS: ORDINANCES REGULATING USE OF
STREETS; RAILROAD CROSSING

Cities and towns in North Carolina, under the power delegated to them by the State, have authority to pass ordinances providing reasonable regulations for the use of streets within the corporate limits; such ordinances may also impose reasonable restrictions governing railway crossings within the corporate limits, and may prohibit the unreasonable blocking of street traffic by a railway company.

ORPHANAGES: UNAUTHORIZED REMOVAL OF ORPHANS

12 August 1947

Where a child has been legally committed to an orphanage, a parent removing such child without proper authorization would be guilty of a criminal offense.

FRANCHISE TAXES: POWER AND TELEPHONE COMPANIES;
LEVIES BY MUNICIPALITIES

13 August 1947

No county, city or town may levy any franchise or privilege tax upon a telephone company in North Carolina, neither may any such municipality impose a new franchise or privilege tax upon any light, power, gas, water, street railway or other public-service company, nor increase any such tax already imposed.

SCHOOLS: GRADE IN WHICH CHILDREN TO BE PLACED

14 August 1947

Under our school law, a child entering a public school at the proper age, but who for any reason is qualified to enter a grade above the first grade, should be placed in whatever grade is justified by the pupil's qualifications.

ESTATE: ADMINISTRATION; FOREIGN CORPORATIONS;
BANKS AS ADMINISTRATORS

15 August 1947

Banking institutions organized under the laws of another state, national banks excepted, are not permitted to engage in business in North Carolina. They may not domesticate under the laws of our state, and for these reasons, cannot qualify or serve as administrator or executor under our laws.

SCHOOL LAW: AUTHORITY TO APPROPRIATE SURPLUS FUNDS FOR THE
CONSTRUCTION OF SUPERINTENDENT'S RESIDENCE

15 August 1947

In the absence of special legislative authorization, a school board may not legally appropriate surplus funds, derived from the sale of school property, for the purpose of constructing a residence for a school superintendent.

N. C. BUILDING CODE: RESTRICTIONS IN FIRE DISTRICTS

15 August 1947

Our state building code provides that no building or structure of frame construction, or of unprotected metal construction, shall be erected within a legally designated fire district.

BANKS: MUNICIPAL LICENSE OR PRIVILEGE TAXES

15 August 1947

In North Carolina, municipal corporations may levy a license or privilege tax on banks located and engaged in business within their corporate limits. This power to tax does not extend to National banks.

COUNTIES: TORT LIABILITY; FIRE INSURANCE; PUBLIC LIABILITY
AND PROPERTY DAMAGE COVERAGE

16 August 1947

The cost of fire or theft insurance on county-owned property is a necessary public expense payable out of county funds, but the cost of public liability and property damage insurance coverage on county-owned or operated motor vehicles is not a necessary public expense, as counties are not liable for tort damages.

SCHOOLS: BOARD OF EDUCATION; EXECUTIVE SESSIONS

16 August 1947

There is no general statute law in North Carolina which prohibits county boards of education or local school boards holding executive sessions, although as a matter of public policy, the State Board of Education or a county board of education may adopt regulations requiring open sessions.

SCHOOLS: EXCHANGE OF SCHOOL SITES

16 August 1947

It is not permissible under our law for a county board of education to exchange school sites, even though the transaction involves no payment of money. Our statutes provide that no school property can be disposed of except at public sale after due advertisement, and the terms of the statute must be observed.

LOTTERIES: SLOT MACHINES; PIN BALL MACHINES; VARYING SCORES

16 August 1947

Our state laws forbid the operation of any slot machine, pin ball machine, or other like device or contrivance upon which varying scores may be made.

SALES TAX: PURCHASE OF CEMENT FOR MANUFACTURE OF CEMENT BLOCKS

16 August 1947

Under our sales tax laws, sales of cement purchased to be used in the manufacture of cement blocks are subject to North Carolina sales tax at the wholesale rate of taxation.

CEMETERIES: REMOVAL OF GRAVES BY CHURCH AUTHORITIES;
CONSENT OF NEXT OF KIN

19 August 1947

In those cases where church authorities desire to enlarge a church building or erect a new church or parish house or parsonage, it is lawful for such authorities to remove graves, after thirty days' notice to relatives of the deceased, if any such are known; and if none are known, then after thirty days' notice posted at the church door. In case of removal, reburial must be arranged in some suitable place, with all monuments and tombstones replaced in as good condition as before removal.

SCHOOL PROPERTY: APPROPRIATIONS; A.B.C. FUNDS

19 August 1947

In the absence of special legislative authority, a board of county commissioners may not legally appropriate funds derived from the operation of A.B.C. stores for the purpose of erecting a residence for a superintendent of schools.

MUNICIPALITIES: SALARY OF MAYOR

19 August 1947

When not controlled by a local act, the governing boards of cities and towns are given authority by our statutes to fix the salary of the mayor, at a figure commensurate with his official duties.

MOTOR VEHICLES FINANCIAL RESPONSIBILITY ACT: EFFECTIVE DATE

20 August 1947

The provisions of the present Motor Vehicles Safety and Responsibility Act did not become effective until July 1, 1947, and, consequently, a driver's license may not be revoked under the new Act for nonpayment of a judgment which became final against him at a June, 1947, term of court.

MOTOR VEHICLES: PARKING IN FRONT OF THEATERS

20 August 1947

Although we have no state-wide statute prohibiting the parking of motor vehicles in front of theaters, cities and towns do have authority to regulate the parking of vehicles on their streets by ordinance, and this includes the right to restrict or prohibit parking in front of theaters.

MOTOR VEHICLES: EMPLOYEE OF COMPANY DELIVERING ONLY FOR COMPANY;
CHAUFFEUR'S LICENSE

20 August 1947

The driver of a motor vehicle used in the delivery of goods of his employer only does not come within the legal meaning of "chauffeur" and is not required to obtain a chauffeur's license.

SCHOOLS: INSURANCE ON CHILDREN ON BUSES

20 August 1947

The statute authorizing the providing of insurance for children transported on school buses leaves the question of providing this insurance entirely in the discretion of the tax levying authorities of the county. This insurance, if provided by the county, would be in addition to, and not in lieu of, any amounts which could be paid by the State Board of Education under other provisions of the statute.

ATTORNEYS AT LAW

20 August 1947

Our statutes make it unlawful for anyone other than a duly licensed attorney at law to give legal advice, or to prepare deeds, or any other legal documents. To do any of these things, without a license, is a violation of law regardless of whether or not any fee is charged.

LICENSE TAX: PEDDLERS; PERSONS SELLING FISH

All persons selling fish in North Carolina are exempt from payment of our peddlers license tax, whether such fish are caught by the person selling them, or someone else.

INSANE PERSONS AND INEBRIATES: COMMITMENT TO STATE HOSPITALS

22 August 1947

In cases where an inebriate has been committed to a State hospital, the clerk of the Superior Court of the county of the inebriate's residence is required to determine whether not the patient is able to pay the cost of care and treatment. In cases where the clerk declares the patient to be indigent, the county of his residence is liable to the hospital for the cost of his board and clothing.

JUSTICES OF THE PEACE: ACCOUNTINGS FOR FUNDS RECEIVED

26 August 1947

Our statutes require all justices of the peace to file an accounting with the proper clerk of the Superior Court, in a public record book furnished by the county, this accounting to contain an itemized and detailed statement of all amounts received by the justice of the peace; it is further required that all funds received by such officials shall be paid into the county treasury within sixty days after receipt thereof.

MOTOR VEHICLES: REGISTRATION PLATES; COMITY

26 August 1947

Under our motor vehicle laws, a non-resident is exempt from our motor vehicle registration requirements for the same time and to the same extent as corresponding exemptions are granted to citizens of North Carolina under the laws of the state, territory, or district in which the non-resident lives.

CITIES AND TOWNS: STATE SPEED LAWS; INTERSECTIONS

28 August 1947

No city or town may legally adopt an ordinance reducing the speed limits fixed by state law, except in the case of street intersections. At street intersections, however, a municipal ordinance requiring motorists to stop, or to reduce speed below the limits fixed by state law, would be valid.

LEGAL ADVERTISEMENT: NEWSPAPER QUALIFICATIONS

29 August 1947

If a newspaper meets all other statutory requirements, the fact that it is actually published in another county does not disqualify it for the purposes of carrying legal advertisements, provided such newspaper is entered and accepted as second-class matter by the postal authorities in the county in which such legal publication is required to be made.

ABANDONMENT: FAILURE TO SUPPORT MINOR CHILDREN

5 September 1947

The duty of a father to support his minor children is not lessened by the fact that a decree of absolute divorce has been obtained; this is an obligation which continues after the marriage relation between husband and wife has been severed by law, and the failure of a divorced father to continue to support his minor children constitutes a criminal offense.

AD VALOREM TAXATION: EXEMPTION OF VETERAN AMPUTEE'S
AUTOMOBILE

8 September 1947

Automobiles furnished by the Federal Government to veteran amputees are exempt from ad valorem taxation in North Carolina, being in the nature of compensation for disability suffered while serving in the armed forces.

PUBLIC CONTRACTS: MUNICIPALITIES; LIMIT ON CONTRACTS
WITHOUT PUBLIC BIDDING

9 September 1947

Under our North Carolina statutes, a municipal corporation may undertake work of a public nature through the use of its own employees, rather than under contract after advertisement and a public letting, provided the cost of such project does not exceed \$5,000.

PUBLIC OFFICERS: CONTRACTING WITH THEMSELVES

9 September 1947

It is a violation of our State law for any public officer to contract with himself; consequently, a member of a board of education cannot legally be paid for driving a school bus while serving on the board, nor can a school committeeman also serve for pay as school janitor, or as a teacher.

INQUISITION OF LUNACY: COSTS

11 September 1947

There is no authority under our law which makes a county liable for costs in an inquisition of lunacy. The inquisition is in the nature of a special proceeding, and costs are to be allowed as in other civil actions.

INCOME TAXATION: ALIMONY NOT DEDUCTIBLE

12 September 1947

Alimony is not a proper deduction from gross income for State income tax purposes in computing the net income of a husband in North Carolina.

EXTRADITION: UNIFORM LAW; EXTRADITABLE OFFENSES

15 September 1947

North Carolina statutes conform to what is known as the Uniform Criminal Extradition Act, which provides that persons may be extradited for any criminal offense made punishable by the laws of the state in which it was committed, irrespective of whether the offense charged is a crime under the laws of the state on which the extradition demand is made.

MUNICIPAL ORDINANCES: PROHIBITING SAWMILLS WITHIN CORPORATE LIMITS

15 September 1947

A sawmill is not necessarily a nuisance in itself, and a municipal ordinance prohibiting the operation of sawmills within the corporate limits on the grounds that all such sawmills constitute a nuisance would not be valid. This does not mean that a particular sawmill could not, upon a proper showing of fact, be suppressed as actually constituting a nuisance. Further, the operation of a sawmill within the corporate limits might well be controlled or prohibited by a properly drawn zoning ordinance.

COUNTIES: DISTRICT HOSPITALS; COUNTY'S LIABILITY

15 September 1947

Under our statutes authorizing counties to participate in the construction and operation of a district hospital, a county does not become liable for any of the obligations of such hospital except to the extent that the board of county commissioners has provided appropriations and contributions therefor.

MUNICIPAL ELECTIONS: RESIDENTIAL REQUIREMENTS

16 September 1947

A person who resides in a house which is actually outside the corporate limits of a town, although a part of the lot upon which the house is located does lie within such limits, is not qualified to vote in a municipal election.

NOTARIES PUBLIC: DATE OF QUALIFICATION

23 September 1947

A notary public may not qualify for a new term by taking the oath of office before the expiration of the current term which he is serving in the same capacity.

BEER AND WINE: RETAIL LICENSE REQUIREMENTS

23 September 1947

In order to legally sell beer or wine at retail in North Carolina, both a State and a county license are required and, in case the retailer conducts such business within the corporate limits of a city or town, a municipal license is also necessary.

MUNICIPAL ELECTIONS: ELECTION OFFICIALS AUTHORIZED TO PASS UPON
RESIDENTIAL QUALIFICATIONS OF ELECTORS

24 September 1947

The judges and registrars of elections in North Carolina are vested with authority to make findings of fact in respect to whether a person proposing to vote actually meets the residence requirements and other qualifications necessary to entitle such person to vote.

GAME LAWS

Our State game laws authorize the confiscation of all instruments and devices illegally used in hunting; it is the illegal use which justifies the confiscation, and, consequently, an ordinary gun used in hunting squirrels out of season would be subject to confiscation, although the type of gun might not, in itself, be illegal in any respect.

MARRIAGE: CAPACITY TO CONTRACT

25 September 1947

A person who is mentally defective to such an extent as to be incapable of contracting for want of will or understanding cannot legally obtain a marriage license in North Carolina.

ADOPTION: MORE THAN ONE CHILD IN A SINGLE PROCEEDING

25 September 1947

All other requirements having been met, there is nothing in our law to prevent the adoption of two or more children in one adoption proceeding. It is required, however, that separate and complete individual reports for each child be submitted to the State Department of Public Welfare.

TAXATION: EXEMPTION OF PROPERTY SOLD TO CHURCH AFTER JANUARY 1

25 September 1947

Ad valorem taxes in North Carolina are due on property as of ownership on January 1st, and are included in the tax liability of the owner as of that date. The circumstance that such property was thereafter sold to a church would not relieve the prior owner of the liability for such tax, which could be collected out of the prior owner's personal property. The tax would also be a lien on the property itself, even under church ownership, and could be collected by sale of the property, if not otherwise satisfied.

COUNTIES: POOR FUND

25 September 1947

The control of expenditures out of county poor funds is vested in the board of county commissioners, exclusively.

JUSTICES OF THE PEACE: DELEGATION OF AUTHORITY TO MAKE ARREST

26 September 1947

In North Carolina, a justice of the peace has no authority to deputize a special officer to serve process in a civil action, and it is only in emergencies, and where a regularly constituted officer is not available, that a justice of the peace may deputize a private individual for the purpose of serving a warrant or other process in a particular criminal case.

ELECTIONS: BOND ELECTIONS FOR HOSPITAL PURPOSES

26 September 1947

In a county election called for the purpose of authorizing the issuance of hospital bonds, the election should be conducted by the county board of elections holding office at the time, and the regular registrars and judges of election should serve. In such an election, it is discretionary with the governing body of the county as to whether a new registration should be required, and the issuance of bonds for the construction of a hospital not being for a necessary public purpose, the approval of a majority of the qualified voters of the county is required.

CONSTABLES: APPOINTMENT OF DEPUTIES

29 September 1947

In North Carolina, a constable has no authority to appoint a permanent deputy for the general discharge of the duties of a constable.

CRIMINAL LAW: EVIDENCE; ACCUSATIONS MADE IN PRESENCE OF DEFENDANT

29 September 1947

Testimony as to the failure of a defendant to deny accusations made in his presence and hearing under such circumstances as to call for a denial is competent and admissible in evidence against such defendant in this State. Conversely, such accusations when specifically denied by the defendant when made, are not competent or admissible in evidence against him; neither is the fact of such denial competent or admissible in the defendant's behalf.

SCHOOLS: OFFICIAL LIABILITY FOR INJURIES IN SCHOOL SPONSORED
ATHLETIC EVENTS

29 September 1947

Under our North Carolina law, neither school officials nor teachers are personally liable in damages for injuries suffered by pupils engaged in school-sponsored athletic events.

ADOPTION: ILLEGITIMATE CHILD OF MARRIED WOMAN; CONSENT;
PROOF OF NON-ACCESS

1 October 1947

Although a child born in wedlock is presumed by our law to be legitimate, still, in cases where it appears to the satisfaction of the proper clerk of the Superior Court that as a matter of fact the husband, by reason of lack of access, could not be the father of the child, then, in an adoption proceeding, the child having been adjudged illegitimate, the consent of the husband is not required and the consent of the mother is sufficient.

COUNTIES: BUILDINGS FOR COUNTY HEALTH DEPARTMENTS; ACQUISITION

2 October 1947

Our statutes authorize boards of county commissioners to purchase real property necessary for any public county building, and this authority is broad enough to justify the purchase of buildings which a board of county commissioners may deem necessary for the housing of a county health department. The purchase price of such building could be met out of any surplus county funds on hand which were derived from sources other than taxation, or an appropriation could be made against current tax levies. However, there is no provision in our law for the issuance of bonds to raise funds for such a program.

MARRIAGE: RESIDENCE; AGE; CONSENT; SPECIAL LICENSE

2 October 1947

Our laws governing the contracting of marriage contain no residence requirement; any person eighteen years of age or over may marry in North Carolina without the consent of parents or guardians. In order for any person under the age of eighteen to legally become married in this State, a special license must be issued by the proper register of deeds, under the conditions set forth in our statutes. Furthermore, all applicants for marriage licenses in this State must present a health certificate before such license can be legally issued.

CLERK SUPERIOR COURT: COMMISSIONS ON FUNDS RECEIVED
BY VIRTUE OF OFFICE

In all cases where a clerk of Superior Court is required to receive funds by virtue of his office, he is entitled to collect the commissions provided for by our statutes, subject to constitutional limitations is respect to fines and forfeitures.

MUNICIPAL CORPORATIONS: TAXATION; MANUFACTURING ENTERPRISES;
LIMITATIONS

4 October 1947

In North Carolina, municipal corporations have the right to levy and collect taxes on all trades, professions and franchises carried on within their corporate limits, unless otherwise provided by law. However, the classification of trades and professions must be based upon reasonable distinctions, and the tax must be uniform within each classification. The circumstance that the State levies a franchise tax upon all domestic and foreign corporations operating within this State does not exempt such corporations from municipal taxation.

ELECTIONS: SPECIAL REGISTRATIONS

6 October 1947

A new registration, ordered for the purposes of holding a special election, does not supplant the existing regular registration books. The special registration applies only to the special election and is of no effect thereafter.

COUNTIES: CONTRIBUTIONS TO MUNICIPAL FIRE DEPARTMENTS

9 October 1947

Municipal corporations are authorized by our statutes to contract for furnishing fire protection to areas within twelve miles of their corporate limits, and counties are authorized to accept such service, and make appropriations and levy taxes for the purpose of carrying out the provisions of such contracts for fire protection.

MUNICIPAL FINANCE: LOCAL IMPROVEMENTS; INTEREST ON INSTALMENTS

10 October 1947

Under our statutes, no penalties prescribed for failure to pay taxes shall apply to special assessments *for local improvements*, but such special assessments shall bear interest at the rate of 6% per annum only.

MUNICIPAL CORPORATIONS: AUTHORITY TO FURNISH ADDITIONAL STREET LIGHTING DURING CHRISTMAS SEASON

10 October 1947

Under a municipality's general charter authority to light its streets, its governing board has authority, within its discretion, to furnish additional lighting during the Christmas season.

PUBLIC ACCOUNTANTS: LICENSE TAXES

13 October 1947

Under our statutory definition, any person who offers his or her service to the public as one qualified to render professional service in the analysis, verification and audit of financial records, and the interpretation of such service through statements and reports, is classified as a public accountant, and must meet the license requirements prescribed by law before engaging in such work. However, a person whose activity is limited to ordinary book-keeping does not fall within the classification of public accountants.

SCHOOL BUILDINGS: USE FOR TEACHING MUSIC AFTER SCHOOL HOURS

15 October 1947

In North Carolina, school committees are entrusted with the care and custody of school property, and have a legal right to authorize, in their discretion, the use of school buildings for the purpose of teaching music or art, after school hours, whether there are tuition charges or not.

PEDDLER'S LICENSE TAX: FRESH FRUITS AND VEGETABLES

15 October 1947

A person selling only farm products which have been raised on premises owned or occupied by the seller is not subject to a State, county or municipal peddler's license tax, so long as he sells such products exclusively.

WILLS: VETERANS; MINORS

Under our law, no person under the age of twenty-one years can make a valid will. This applies to all minors, including those in the armed services.

ALCOHOLIC BEVERAGE CONTROL STORES: NEAR CHURCHES OR SCHOOLHOUSES

21 October 1947

Our general statutory provisions limiting the sale of certain alcoholic beverages in the vicinity of churches or schoolhouses applies to the sale of beer and wine only. However, the location of every A.B.C. store must be approved by the State Alcoholic Beverage Control Board.

TAXATION: AD VALOREM TAX ON PERSONAL PROPERTY OF GI STUDENT

21 October 1947

Veterans attending school under the GI Bill are not, by reason of such status, exempted from payment of ad valorem tax on personal property. They are subject to ad valorem taxation on the same basis as other citizens, irrespective of whether they live on the campus or elsewhere.

TAXATION: DOG TAX

22 October 1947

There is no restriction in this State on the number of dogs a person may own, but all dogs, regardless of age or sex, are required to be listed for taxes at an annual rate of one dollar each, with the exception of open female dogs six months of age or over which must be listed at two dollars each, annually.

INHERITANCE TAXATION: TIME OF VALUATION OF ESTATE

23 October 1947

Under our inheritance tax laws, the estate of a decedent must be valued for purposes of such tax as of the date of the death of the decedent.

CARRYING CONCEALED WEAPON: CONFISCATION; RETURN TO INNOCENT OWNER

27 October 1947

In cases of conviction of carrying a concealed weapon under our law, a rightful owner, other than the defendant, may, at the time of the conviction or submission, file a petition setting forth his ownership and innocence, and requesting that the weapon be returned to him. This petition must be filed at the time of conviction or submission, and cannot properly be filed later.

**BEER: SALE ON SUNDAY IN VIOLATION OF REGULATIONS;
REVOCATION OF LICENSE**

27 October 1947

Boards of county commissioners and the governing boards of cities and towns have authority under our statutes to regulate or prohibit the sale of beer or wine on Sunday, and may revoke beer or wine licenses on the grounds of violation of such regulations. Where such revocation has occurred, no license whatsoever may be issued within six months of the date of revocation, for the sale of wine or beer on the same premises.

NON COMPOS MENTIS VETERANS: COMMITMENT OR TRANSFER TO
VETERANS ADMINISTRATION

31 October 1947

Under our statutes, a non compos mentis veteran may be committed directly to a Veterans' Administration hospital, or he may be committed to one of our State hospitals and then transferred to the Veterans' Administration hospital.

RENTAL OF COURTROOM FOR COMMERCIAL USES

31 October 1947

A county courthouse being intended primarily for essentially public use, a board of county commissioners would not be justified in leasing or renting the courtroom for the purpose of operating a moving picture show or a theater, or for any other commercial purpose.

MINORS: VETERANS; GUARDIANS

10 November 1947

There is no provision of North Carolina law under which the interest of a minor veteran in an estate could be paid or delivered directly to such minor, without the appointment of a guardian.

CRIMINAL PROCEDURE: JURY TRIAL BEFORE JUSTICE OF PEACE;
DEPOSIT OF JURY FEE

12 November 1947

The right to trial by jury in a criminal action before a justice of the peace is available under our statutes, but a deposit of a three dollar jury fee in advance is required before a defendant is entitled to such jury trial.

TAXATION: COUNTIES; BACKLISTING; PENALTIES

17 November 1947

Our statutes provide a penalty of ten per centum for failure to list property or poll for taxation before the close of the regular listing period, and where such property or poll is taxed for years preceding the current year, an additional penalty of ten per centum per annum is imposed, with a minimum penalty of one dollar.

TAXATION: AD VALOREM; TAX SITUS OF PERSONAL PROPERTY

18 November 1947

The general rule to be followed in determining the tax situs of personal property is that such property should be listed for taxation at the domicile of the owner, unless the property itself has acquired a business situs other than the owner's domicile.

MUNICIPAL CORPORATIONS: OPENING AND CLOSING HOURS FOR
BUSINESS ON SUNDAYS; POLICE POWER

18 November 1947

In the exercise of its police powers, a municipal corporation may by reasonable and uniform ordinances, regulate the hours during which businesses or mercantile establishments may remain open on Sundays within its corporate limits.

TAXATION: AD VALOREM; LIEN OF PERSONAL PROPERTY TAX ON REALTY

Under our statutes, a lien for personal property taxes attaches only to such real property as the taxpayer owned in the taxing unit at the time for listing of such personal property for taxation.

BEER AND WINE LICENSES: RESIDENCE QUALIFICATIONS

20 November 1947

Our statutes prohibit the issuance of retail beer or wine license to any person, firm or corporation not having been a bona fide resident of this State for at least one year *next preceding such issuance*.

SCHOOLS: CHANGING TOWNSHIP LINES; EFFECT ON BOUNDARIES
OF SCHOOL DISTRICT

20 November 1947

The changing of township lines does not in itself operate to change the boundary lines of a school district.

MUNICIPALITIES: ESCALATOR CLAUSES IN BIDS

20 November 1947

A municipality, in considering competitive bids, may accept an otherwise proper low bid containing an escalator clause, provided there is a definite limitation on the possible increase of cost under such clause, and provided further, that even with the maximum possible increase added, the bid accepted would still be less than the next lowest proposal received.

MUNICIPALITIES: PAYMENT OF GROUP LIFE INSURANCE PREMIUMS

22 November 1947

Our statutes authorize municipal corporations to pay premiums upon a group insurance policy covering municipal employees, provided such coverage does not exceed \$2,000 on any one employee.

COURTS: MAYOR'S COURT; JURISDICTION NOT CO-EXTENSIVE WITH
MUNICIPAL POLICE OFFICERS' POWER OF ARREST

1 December 1947

The territorial jurisdiction of our mayors' courts is confined to matters arising within the respective corporate limits, and the circumstance that certain municipal police officers have been given powers of arrest beyond their corporate limits does not operate to extend the jurisdiction of a mayor's court to such outside territory.

MEDICAL CARE COMMISSION: HOSPITALS; AUTHORITY OF COUNTY, CITY OR
TOWN TO CONTRIBUTE TO NON-PROFIT HOSPITAL CORPORATION

1 December 1947

Assuming that a non-profit hospital can qualify as such under our statutory definition, a county, city or town has authority under our law to make contributions of cash, fuel, electric power and building material to such non-profit corporation for hospital purposes.

MUNICIPALITIES: NATIONAL GUARD; DONATIONS OF LAND AND PROPERTY

1 December 1947

Under an Act of our 1947 Legislature, creating the North Carolina Armory Commission, any county or municipality may convey to the State any real property suitable for use in the training, administration or development of any duly constituted military unit of which the Governor is Commander-in-Chief. Any indebtedness or expenditure incurred or made by a county or municipality in accordance with the provisions of this Act are declared by the statute to be a necessary expense and for a public purpose.

COUNTIES: SCHOOL BONDS; NECESSARY EXPENSE; DEBT LIMITATION

1 December 1947

Bonds for the purpose of erecting school buildings necessary for conducting the constitutional school term cannot be issued without the approval of a vote of the people, if the amount of the proposed bonds would be in excess of two-thirds of the debt retirements for the preceding fiscal year. However, if the amount of the proposed bond issue is within the constitutional debt limitation provision, such bonds could be issued without a vote of the people.

STREETS: DEDICATION; FILING MAPS; REVOCATION OF DEDICATION
BEFORE ACCEPTANCE

1 December 1947

Under our law, the owner of property which has been mapped for subdivision, and the map filed of record, may, with the consent of all purchasers of lots in such subdivision, withdraw the streets therein from dedication, provided there has been no public acceptance of such dedication by municipal or park authorities.

TAXATION: PEDDLERS SELLING BY SAMPLE FOR IMMEDIATE DELIVERY;
SELLING BY SAMPLE FOR MAIL DELIVERY

2 December 1947

A person without an established warehouse in this State, who makes retail sales by sample or otherwise for immediate delivery, is subject to the provisions of our statutes governing peddlers, and is liable for the tax and license requirements imposed by our statutes. However, this peddlers liability does not attach in cases where orders are taken in this State, from sample or otherwise, for future delivery by commercial transportation or by mail.

CRIMINAL LAW: MOTOR VEHICLES; DRIVING UNDER INFLUENCE OF
INTOXICATING LIQUOR; AIDING AND ABETTING

2 December 1947

Before a person can be properly convicted of aiding and abetting the offense of operating a motor vehicle while under the influence of intoxicating liquor, there must be evidence to the effect that the abettor either directly or indirectly permitted an intoxicated person to operate an automobile over which the abettor had control.

EXECUTORS AND ADMINISTRATORS: PUBLICATION OF NOTICE TO CREDITORS;
FINAL SETTLEMENT

3 December 1947

While it is accepted procedure for an administrator or executor to publish a notice to creditors and debtors, this is not a necessary condition precedent to the final settlement of an estate under North Carolina law. The failure to publish such notice may have an effect upon the running of the statute of limitations, and might in some circumstances make the administrator or executor personally liable for distribution without such notice. However, the question for the clerk of the court to consider is whether the final account represents a true and complete final settlement, irrespective of notice to creditors and debtors.

PUBLIC HEALTH: MUNICIPAL CORPORATIONS; INSPECTION OF PUBLIC WATERSHEDS;
AUTHORITY OF INSPECTORS WHERE WATERSHED EXTENDS
INTO MORE THAN ONE COUNTY

4 December 1947

A municipal watershed inspector, acting within the scope of his authority and within the confines of a municipal watershed, has power to act in his official capacity, as inspector, even though such watershed may extend into more than one county or other geographical division or governmental unit. However, an inspector deputized to make arrests in one county cannot exercise that right in another; neither can he be properly deputized in any county in which he is not a resident citizen. Furthermore, in case of prosecution for violation of watershed regulations, the prosecution must be brought in the county where the offense is alleged to have occurred.

AD VALOREM TAXATION: LISTING; FARM PRODUCTS; ADVANCES AGAINST

6 December 1947

In listing farm products for ad valorem taxation, our present statutes do not permit the deduction from the value of tobacco of any advances made against it.

CRIMINAL LAW: INTOXICATING LIQUORS; FEDERAL LICENSE AS
PRIMA FACIE EVIDENCE

6 December 1947

The possession of a Federal license to sell or manufacture intoxicating liquors constitutes prima facie evidence sufficient to withstand a motion for nonsuit and to go to the jury in a prosecution charging possession of liquor for the purpose of sale in violation of our State laws.

MUNICIPALITIES: POWER TO REGULATE STORAGE AND SALE OF
FUELS AND EXPLOSIVES

6 December 1947

Our statutes expressly authorize municipal corporations to pass ordinances regulating, controlling or prohibiting the handling, transportation and storage of gun powder and other combustible or dangerous substances within the corporate limits. This authority includes the right to pass ordinances reasonably regulating the handling, transportation or storage of gasoline or kerosene within the corporate limits.

PROCESS TAX: CONFESSION OF JUDGMENT

6 December 1947

The two dollar process tax imposed upon plaintiffs and appellants in civil actions in this State is collectible upon the issuance of a summons or the docketing of an appeal in a civil action, and as no summons issues in cases of judgment by confession, this process tax should not be collected in such cases.

ADOPTION: CONSENT; JUVENILE COURT; SUPERINTENDENT OF PUBLIC
WELFARE; ADJUDICATION OF ABANDONMENT BY JUVENILE COURT

9 December 1947

Under N. C. law, a judge of a juvenile court has no right to authorize a county superintendent of public welfare to give consent to an adoption. The judge may, in a proper proceeding, find as a fact that a parent is unfit to have the care and custody of a child, or that there has been a wilful abandonment by a parent, and upon such finding, the clerk is authorized to dispense with the consent of such parent in an adoption proceeding.

MOTOR VEHICLES: USE OF SIRENS AND RED LIGHTS ON FRONT OF
PRIVATELY-OWNED VEHICLES PROHIBITED

10 December 1947

Our statutes prohibit the use of sirens or red lights on the front of any privately-owned motor vehicle. Red front lights are allowed only on police cars, highway patrol cars, ambulances, wreckers, fire fighting vehicles or vehicles of officially approved voluntary life saving organizations while actually on official call; even in these cases the car must be owned by the department or organization, and not by a private individual.

PLUMBERS, ELECTRICIANS: EXAMINATION; CONTRACTORS;
SALARIED EMPLOYEES

10 December 1947

Our statutes require all plumbing and heating contractors to pass an examination and receive a license from the State before engaging in any such contracting. However, a person not operating as a plumbing or heating contractor, but employed regularly upon a salary basis to do maintenance and repair work on the heating plant or other installations by an employer, is not a plumbing or heating contractor within the meaning of our statutes, and is not required to take the prescribed examination or secure a State plumbing and heating contractor's license.

MAPS: FOR WHOM RECORDED; ALTERATIONS

10 December 1947

Our statutes require a register of deeds, at the instance of the owner of any land in this State, to record in his office a map or plat of such property, upon proper proof and probate of such map or plat. This recording is to be done only at the instance of the owner of the land. The register of deeds is without authority to record any such map or plat on his own motion, neither is he authorized to permit any alteration by anyone after a map or plat has been recorded.

SCHOOL BONDS: COUNTY-WIDE BASIS; DISTRICT BASIS;
CLEVELAND COUNTY ACT

11 December 1947

Our State-wide County Finance Act authorizing school bond elections for the construction of schoolhouses requires that such bonds be issued on a county-wide basis. However, a number of counties operate under what is known as the Cleveland County Acts, which special acts authorize the issuance of such bonds on a school district basis. These special acts have been held to be constitutional by our Supreme Court,

CRIMINAL LAW: PUBLIC NUISANCE; PADLOCKING OF PRIVATE DWELLING

11 December 1947

The language of our statutes covering the abatement of public nuisances is broad enough to cover a private dwelling which is used in such a way as to constitute a public nuisance. Such objectionable use may be enjoined in a proper action for the abatement of a public nuisance, and even a private dwelling may be "padlocked" as an incident to such abatement.

CRIMINAL LAW: SALE OF WEAPONS; PERMITS; PURCHASER ENTITLED
TO RETAIN PERMIT

11 December 1947

Under our statutes, any person receiving within this State any pistol, pump-gun, bowie knife, dirk, dagger, or metallic knucks by mail, express, or freight, must have in his possession and exhibit to the agency or person from whom such weapon is received, a permit from the proper clerk of Superior Court, authorizing the purchase and receiving of such weapon. The person to whom such permit was issued by the clerk has the right to retain the original, and while the agency or person may desire a copy as a matter of record, the statute does not require the clerk to issue such permits in duplicate.

WILDLIFE RESOURCES COMMISSION: REGULATIONS AS TO INLAND FISH;
CRIMINAL JURISDICTION OF JUSTICE OF PEACE

11 December 1947

Our Supreme Court has held that a violation of State regulations governing inland fishing constitutes a misdemeanor, punishable by fine or imprisonment in the discretion of the court. Such being the law, a justice of the peace has no final jurisdiction to dispose of cases of such violation, his authority extending only to the question of determining whether probable cause exists, and whether the defendant should be bound over to a higher court, or dismissed.

SCHOOLS: SUPPLEMENTS CAN BE USED ONLY FOR SCHOOL OPERATION,
NOT FOR BUILDING

15 December 1947

Our statutes authorize supplemental school elections to be held in any district in a county administrative unit having a school population of one thousand or more, but the funds derived from the taxes levied as the result of such an election can be legally used only for the operation of the school, and not for the construction of buildings.

COUNTY AND MUNICIPAL FINANCE ACT: HOSPITALS; SPECIAL ELECTIONS

15 December 1947

In an election upon the question of levying taxes for the purpose of raising funds for hospital purposes under the 1947 Act of our General Assembly, it is discretionary with the governing body of the county or city as

to whether or not a new registration shall be required, but in any event, a majority of the registered voters would be necessary in order to carry the election.

BEER AND WINE EXCISE TAXES: EXPENDITURES BY COUNTIES

18 December 1947

The proceeds of beer and wine excise taxes, when allocated to the various counties and municipalities as provided by statute, may be used by the respective counties or municipalities in the same manner as any other general or surplus funds of such unit may be used.

STATE PROPERTY: FIRE INSURANCE; REPLACEMENT OF PROPERTY

18 December 1947

Under a 1945 Act of our Legislature, the State became a self-insurer of all State-owned property against fire. This statute set up a State Property Fire Insurance Fund, and authorizes the Governor and the Council of State to provide such funds as they may consider necessary to fully replace any loss sustained by fire.

VETERANS GUARDIANSHIP ACT: COMMITMENT TO VETERANS' ADMINISTRATION HOSPITAL

18 December 1947

Before a clerk of Superior Court commits a veteran to a Veterans' Administration hospital, he should have in hand a certificate from the Veterans' Administration or other agency to the effect that facilities are available, and that the veteran is eligible for care and treatment therein. However, no particular formality is required as to the certificate, and an authenticated letter or telegram carrying the essential information may be considered substantial compliance with the procedural requirement.

OYSTERS: TAKING FROM PRIVATE BEDS

18 December 1947

The rules and regulations of the Department of Conservation and Development, governing the taking of oysters, including the inspection requirements, apply to oysters taken from private beds as well as those taken from public bottoms.

MOTOR VEHICLE LAWS: SPEEDING; RECKLESS DRIVING; PUNISHMENT

19 December 1947

Under our statutes, the maximum penalty for speeding and for careless and reckless driving is a fine of \$100.00 or imprisonment for sixty days, or both such fine and imprisonment. In addition, there may be imposed such suspension or revocation of driver's license as the circumstances and the statutes indicate.

NOTARIES PUBLIC: DATE OF EXPIRATION OF APPOINTMENT

20 December 1947

A notary public holds office for two years from and after the date of his appointment. In computing this two-year period, the date of appointment should be excluded and the last day included. As an example, a commission issued to a notary public on the 19th day of December, 1947, would expire at midnight on the 19th day of December, 1949, unless that date should fall on Sunday or a legal holiday, in which case it would expire at midnight of the day next following such Sunday or holiday.

BEER AND WINE: RETAIL LICENSE NOT TRANSFERABLE

31 December 1947

A retail license to sell beer and wine is a personal license, based in part on personal qualifications, and is not transferable.

SPECIAL ASSESSMENTS: FORECLOSURES; PROCEDURE

13 December 1947

An action to foreclose a lien of special assessments for local improvements may be joined in an action to foreclose taxes, or a separate action to foreclose such special assessment liens may be instituted, independent of any action to foreclose taxes.

INCOME TAX: CLUB GROCERY STORES; LEGALITY

3 January 1948

We have no statutory prohibition against the operation of so-called "Club Grocery Stores," in which groceries are sold to club members at cost, upon the payment of club dues. However, such stores are liable for income taxes on any net profits realized from such operation, upon the same basis as any other business concern.

MUNICIPALITIES: LOCAL IMPROVEMENTS; SPECIAL BENEFITS; RAILWAY RIGHTS OF WAY; ASSESSMENTS

10 January 1948

Under our statutes, assessments against a railway company by a municipality on account of local street improvements along the railroad's right of way are limited to the cost of paving between the railroad tracks and for eighteen inches on each side thereof.

TAXATION: AD VALOREM; RELIEF BECAUSE OF BUILDING DESTROYED BY FIRE

12 January 1948

A board of County Commissioners may revalue real estate upon which buildings have been destroyed or seriously damaged by fire, but a property owner who suffered such damage by fire after January 1st of a tax year,

would not be entitled to any such relief until the Board of County Commissioners had passed upon the revaluation of the next succeeding assessment period; and in no event could such relief be retroactive. The law is otherwise as to windstorm damage not compensated by insurance or otherwise occurring up to the 1st of April.

**SCHOOL LAWS: STREET PAVING ASSESSMENTS; LIABILITY OF
SCHOOLS FOR ASSESSMENTS**

13 January 1948

A School Board has no authority to construct sidewalks upon property which does not abut school property, or to incur liability for such construction. However, upon formal request of a School Board, the school would become liable for improvement assessments on account of sidewalk construction on abutting property which had been dedicated and accepted for sidewalk purposes.

AD VALOREM TAXATION: EXEMPTIONS; INDUSTRIAL PROPERTY

16 January 1948

It is not permissible for county authorities to grant exemption from ad valorem taxation to an industrial or manufacturing enterprise as an inducement to locate or operate such enterprise within the county.

AIRPORTS: RIGHT OF MUNICIPALITY TO LEASE WITHOUT VOTE OF PEOPLE

16 January 1948

The governing body of any North Carolina city or town has statutory authority to construct, acquire, lease and operate airports or landing fields, and may enter into such a lease agreement without a vote of the people, provided the expense of such lease does not involve the levying of any tax or borrowing any money.

**INTOXICATING LIQUORS: CONFISCATION AND DISPOSITION
OF ILLEGAL LIQUOR**

21 January 1948

Under North Carolina law, neither a State Highway Patrolman nor any other peace officer has any authority to destroy any intoxicating liquor illegally possessed or transported, unless such officer is proceeding under an order of a Court of competent jurisdiction authorizing such destruction.

MOTOR VEHICLES: DRIVERS' LICENSES; NOTATIONS ON LICENSES

21 January 1948

Our statutes provide that convictions of violation of our Motor Vehicle laws shall be entered by the Court in writing on the violator's license card. Consequently, in instances where such license card is enclosed or sealed within a case or cover, it must be removed in order for the required notation to be made.

PRIVATE DETECTIVES: NOT PRIVILEGED TO CARRY CONCEALED WEAPONS

21 January 1948

A private detective or investigator has no more authority or right than any other private citizen of North Carolina to carry a gun or other deadly weapon, concealed or otherwise.

BEER AND WINE: ILLEGAL SALE VIOLATION OF PROHIBITION LAWS

21 January 1948

The sale of wine or beer without the licenses required by our statutes is a violation of our prohibition laws, and a person convicted of such violation is not entitled to receive a license for the sale of wine or beer until at least two years after the date of such conviction.

MOTOR VEHICLE LAWS: CARELESS AND RECKLESS DRIVING; SPEEDING IN EXCESS OF 75 M.P.H.; PENALTIES

21 January 1948

Our Motor Vehicle Department has statutory authority to suspend the license of any driver upon it appearing to its satisfaction that the driver has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour, or upon one or more charges of careless and reckless driving and one or more charges of speeding in excess of 55 miles per hour but less than 75 miles per hour. It is further provided that the department shall revoke the license of any driver upon it appearing to its satisfaction that such driver has been convicted or has finally forfeited bail upon two or more charges of careless and reckless driving within a period of twelve months.

VETERANS: POLL TAX EXEMPTIONS

No World War II peace treaties have been concluded yet, and until that occurs, members of the armed forces as well as members of the merchant Marine service who are on active duty, are exempt from payment of poll tax in this State. This exemption does not apply to former members of such services, however.

CRIMINAL LAW: TAXICAB FARE

22 January 1948

We have no State-wide statute which undertakes to make a criminal offense out of a failure or refusal to pay a taxicab fare.

SCHOOLS: SUPPLEMENT ELECTIONS; WHEN SAME MAY BE HELD

23 January 1948

There is no prohibition in our statutes against holding a school supplement election within sixty days of a regular election; our statutes only provide that the county board of education or the trustees of a city administrative unit, as the case may be, shall upon approval of the election petition, fix the date for the election.

COUNTIES: WELFARE DEPARTMENT; SALARIES OF EMPLOYEES—
HOW DETERMINED

23 January 1948

Where a county accepts State and Federal funds provided for old age assistance, aid to the needy blind, aid to dependent children and the like, the employees of the county welfare board, including the county superintendent of welfare, must be appointed and paid in accordance with the Merit System plan and procedures. However, the Merit System Council fixes only the maximum and minimum salaries to be paid employees within designated classifications and, within these limits, the actual amount of the salaries of such employees, with the exception of the superintendent, can be fixed by the county board of commissioners.

CONSTITUTION: SCHOOLS; FINES AND FORFEITURES

27 January 1948

Our State Constitution provides that the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for violation of the penal or military laws of the state shall be retained by the respective counties, and appropriated for the establishment and maintenance of our public school system.

MARRIAGE LAWS: WHERE MARRIAGE CEREMONY TO BE PERFORMED

27 January 1948

Under North Carolina law, a marriage ceremony must be performed in the county in which the marriage license is issued.

HUSBAND AND WIFE: U.S. WAR BONDS ISSUED IN NAME OF BOTH;
INHERITANCE TAX

28 January 1948

Under U. S. Treasury Regulations, bonds payable to a man or his wife are payable to the survivor. This does not, however, exempt from our inheritance tax the estate of the spouse who furnished the money for the purchase of such bonds, this being controlled by different principles of law.

WORKMEN'S COMPENSATION: JURYMEN AS COUNTY EMPLOYEES

28 January 1948

Although there are no North Carolina decisions directly in point, the better reasoning would seem to be that a juror or grand juror is not an employee of the county, within the meaning of our Workmen's Compensation Act.

CRIMINAL LAW: EXHIBITION OF OBSCENE OR IMMORAL PICTURES

28 January 1948

While North Carolina has no statutory provision for State censorship of moving pictures, our statutes do make it a criminal offense for anyone, for gain or otherwise, to exhibit any obscene or immoral motion pictures or to post any obscene or immoral picture, drawing, writing or the like, or to conduct or permit any obscene or immoral show or exhibition. Furthermore, cities and towns have statutory authority to regulate or abate performances and exhibitions detrimental to the public health, morals, or welfare of the people.

SCHOOLS: SUPPLEMENTAL ELECTIONS; DESIGNATION OF POLLING PLACES

3 February 1948

For purposes of holding a local supplemental school election, it is permissible under our school laws for a board of county commissioners to designate one polling place at which all the electors of an entire school district may register and vote.

MEMBERS OF GENERAL ASSEMBLY: MANNER OF FILLING OF VACANCIES

9 February 1948

Under our State Constitution, the only way in which a vacancy in the membership of our House of Representatives can be filled is by a special election. It could not be filled by action of the county executive committee.

SUNDAYS: STATE LAW; MUNICIPAL ORDINANCES

10 February 1948

The only state-wide statute which undertakes to regulate the conduct of business on Sunday is the statute which provides a penalty of one dollar for anyone convicted of carrying on any business or work on the Lord's Day. In addition to this statute, cities and towns are authorized to enact ordinances regulating the opening and closing hours of stores on Sunday, and an ordinance requiring the closing of certain classes of business during certain hours on the Sabbath has been held valid by our Supreme Court.

MAYOR'S COURTS: JURISDICTION

11 February 1948

Under our General Statutes, mayors of cities and towns are given the same jurisdiction as justices of the peace, and the rules of law regulating proceedings before a justice of the peace apply also to legal proceedings before a mayor.

TAXATION: MUNICIPALITIES; SEWER ASSESSMENTS; REFUNDS

17 February 1948

Under our Supreme Court decisions, a municipal sewer rental charge is not construed as a tax and, as our statutory prohibitions against refunds relate to taxes as distinguished from assessments or rental charges, a municipality may, in proper cases, make refunds to persons who have overpaid a sewer rental account.

HOUSE OF REPRESENTATIVES: ELECTION TO FILL VACANCIES

17 February 1948

Our statute authorizing the Governor to call a special election for the purpose of filling a vacancy in the membership of our General Assembly provides that such election may be held at such time as the Governor may designate. It is doubtful, however, that the Governor would be required to call a special election to fill a vacancy occurring after the adjournment of the General Assembly, or for the sole purpose of electing a member to serve in a special session of the General Assembly, unless the public interest required the filling of such vacancy.

FOREIGN BANKS: QUALIFICATION AS EXECUTOR OR TRUSTEE IN THIS STATE

18 February 1948

Our statutes provide that foreign corporations, including banks and trust companies, are not eligible to qualify in this State as executor, administrator, guardian or trustee under the will of any person domiciled in this State at the time of death. The appointment of a co-executor or other co-fiduciary would not serve to cure this ineligibility of a foreign corporation.

SCHOOLS: SITES ACQUIRED MUST BE WITHIN BOUNDARIES OF
ADMINISTRATIVE UNITS

20 February 1948

Under our law, school sites acquired by a city administrative school unit must be located within the boundaries of such administrative unit, if the school is under the control of the city administrative board.

PUBLIC RECORDS: PETITION FOR A.B.C. ELECTION; PERMITTING INSPECTION

20 February 1948

A petition for an election under our Alcohol Beverage Control Act, having been filed with the proper authorities, becomes a public record, and it is the duty of the chairman of the county board of elections to permit the examination and inspection of such petition at all reasonable times, and subject to his supervision.

LOTTERY LAWS: SALES TICKETS; LUCKY NUMBERS

26 February 1948

Under our statutes prohibiting all manner of lotteries, it is unlawful for a merchant to give tickets with each purchase and award a prize by drawing a number to determine the winner of such prize from among the purchasers.

LOTTERIES: "JACK POT NIGHT"

1 March 1948

The scheme commonly known as "Jack Pot Night" falls within the legal definition of a lottery in North Carolina, and the operation of such a scheme is a criminal offense under our statutes.

MUNICIPAL TAXATION: LIMITATION ON GENERAL EXPENSE TAX RATE

An Act of the General Assembly of 1947, effective from and after March 28, 1947, increased the limitation on the valuation of property for the purpose of taxation for the general expenses of municipalities. Previously, this limitation was \$1.00 on the \$100.00 valuation; the 1947 Act raised this to \$1.50.

JUSTICES OF THE PEACE: CARRYING CONCEALED WEAPON

1 March 1948

Under our laws, a justice of the peace has no more authority than any other private citizen to carry a concealed weapon; neither does he have the power of arrest, as he is not, by virtue of his office, a peace officer.

MOTOR VEHICLES: FINANCIAL RESPONSIBILITY ACT; BANKRUPTCY

1 March 1948

A proceeding or even a final discharge in bankruptcy does not relieve a judgment debtor from any of the requirements or responsibilities of our Motor Vehicle Financial Responsibility Act.

COURTS: COUNTY CRIMINAL COURTS; ISSUANCE OF PROCESS

1 March 1948

Clerks or deputy clerks of county criminal courts are authorized to issue warrants or other legal process of such courts, returnable before the judge of any such court; such warrants or other process should be directed to the sheriff or other lawful officer of the proper county, and run anywhere in the State, and shall be executed by all proper officers in the same manner as processes issued by the Superior Court.

LOTTERY LAWS: SLOT MACHINES

Under our gaming and lottery laws, all slot machines are illegal, except those which vend merchandise of equal value at each operation, or those which dispense music, or those which can qualify as stencil-making or weighing machines.

ELECTION LAWS: PUBLIC OFFICERS AS ELECTION OFFICIALS

8 March 1948

Our Supreme Court has held that a commissioner for a special purpose is not a public officer in the legal sense of the word, and it follows that such a commissioner would not fall within our constitutional prohibition against double office holding. This being the case, a commissioner appointed to perform a single act, or for a single definite and confined objective, could also act as an election official without violating the prohibition against double office holding.

MUNICIPALITIES: RIGHT TO REQUIRE MAINTENANCE OF
RAILROAD INTERSECTIONS

5 March 1948

Our statutes authorize municipalities to give notice to railroad companies requiring them to repair a street or grade crossing within the corporate limits, and a failure to comply with such notice within thirty days will subject the railroad company to criminal prosecution, as well as civil liability.

PROBATE OF INSTRUMENTS: ACKNOWLEDGMENT BY MAYORS

8 March 1948

In North Carolina, mayors of municipalities are not authorized to take acknowledgments to instruments of writing which are permitted or required by our law to be registered. (This corrects a former opinion in some respects.)

SCHOOLS: FUNDS FROM SALE OF CONFISCATED LIQUORS CONSTITUTE A
FORFEITURE; DISPOSITION

9 March 1948

Funds derived from the legal sale of confiscated liquors constitute forfeitures under our law, and as such must be turned over to the county current expense school funds, to be apportioned among the several administrative school units of the county on a per capita enrollment basis.

MUNICIPAL CORPORATIONS: TAX RATE LIMITATION

11 March 1948

The tax which a municipality may impose for general purposes is limited by our law to one dollar and fifty cents on each one hundred dollar valuation of property.

CRIMINAL LAW: LOTTERIES "FLICKER CROWNS"

12 March 1948

The practice of printing or stamping numbers upon the caps attached to beverage bottles, certain of such numbers entitling the purchaser or holder to a free drink or other prize or reward, constitutes a violation of our gaming and lottery laws. The fact that the holder of such lucky number is required to submit a slogan or other written statement in order to win does not excuse the offense.

ELECTIONS: SCHOOL SUPPLEMENT; DATE FIXED BY COUNTY COMMISSIONERS

19 March 1948

A board of county commissioners or other governing body calling a school supplement election is authorized to fix the date upon which such election shall be held, at any reasonable time within its discretion.

ELECTIONS: PERSONS BECOMING QUALIFIED VOTERS BETWEEN
PRIMARY AND ELECTION

19 March 1948

A person may vote in a primary in North Carolina if such person would be qualified to vote in the next following general election. That is to say, persons becoming qualified voters between the dates of the primary and the general election may vote in both.

ALIENS: RIGHT TO HOLD AND CONVEY REALTY; RIGHT TO BRING SUIT

19 March 1948

There is no limitation in North Carolina on the right of an alien to bring suit in our courts, or to acquire, hold and convey property. This includes both alien individuals and corporations.

JURORS: EXEMPTIONS

19 March 1948

Under our law, neither notaries public, county surveyors or justices of the peace are exempt from jury duty.

SCHOOLS: COMPULSORY ATTENDANCE LAW

22 March 1948

Our compulsory school attendance law applies only to children between the ages of seven and sixteen years. Therefore, a pupil cannot be required to attend school after he attains the age of sixteen, even though this may be during a current school term.

MARRIAGE LAWS: ISSUANCE OF LICENSE

23 March 1948

It is not incumbent upon a register of deeds to inquire into the divorce status of an otherwise qualified applicant for a marriage license. The validity of a divorce is a question to be determined by the courts upon proper presentation, and the register of deeds should not concern himself with this question.

PARENT AND CHILD: LIABILITY OF FATHER TO SUPPORT MINOR

24 March 1948

A father is required under our law to support his children until they reach the age of twenty-one years. This duty extends beyond this age in cases where the child is mentally incompetent upon reaching the age of maturity.

MOTOR VEHICLE LAWS: DUTY TO STOP IN CASE OF ACCIDENT

26 March 1948

In North Carolina, the driver of any motor vehicle involved in an accident resulting in injury or death of a person, or damage to property, must immediately stop such vehicle at the scene of such accident, and failure to do so is a violation of our criminal statutes.

SHERIFFS: VACANCIES; TERMS FOR WHICH VACANCIES FILLED

26 March 1948

A sheriff appointed by a board of county commissioners to fill a vacancy in that office, holds for the entire remainder of the unexpired portion of the regular four-year term for which his predecessor in the office of sheriff was elected.

CLERK OF SUPERIOR COURT: VACANCIES; ELECTION FOR
UNEXPIRED TERM

26 March 1948

Our Constitution provides that in case the office of clerk of Superior Court becomes vacant otherwise than by expiration of the term and by failure of the people to elect a successor, the judge of the Superior Court shall appoint someone to fill the vacancy until an election can be regularly held. This has been construed by our Supreme Court to mean until the next general election.

MOTOR VEHICLES: FINANCIAL RESPONSIBILITY ACT; LIABILITY OF
DRIVERS NOT OWNING VEHICLE

26 March 1948

A person whose license has been revoked or suspended under our Uniform Drivers' License Act is not entitled to have such license reissued or reinstated until such person shall have given proof of financial responsi-

bility in accordance with our Financial Responsibility Act. The fact that the original revocation or suspension took place before the enactment of the Financial Responsibility Act does not relieve the driver of the necessity of complying with the provisions of such Act; neither does the circumstance that he does not own a motor vehicle himself exempt him from meeting these requirements.

MOTOR VEHICLES: TRANSFER OF TITLE; EFFECT OF CERTIFICATE OF TITLE

27 March 1948

A certificate of title to a motor vehicle issued by our Motor Vehicle Department does not afford protection in a controversy between the holder of such certificate and the lawful owner of the vehicle. The innocent holder of a fraudulent certificate of title would be in the same position as any other purchaser imposed upon by fraud.

MOTOR VEHICLES: LOCAL REGULATIONS PERMITTING PASSING ON THE RIGHT

30 March 1948

Local governing authorities cannot by ordinance or local regulation alter the provisions of our general statutes so as to permit a motor vehicle overtaking another vehicle to pass on the righthand side of such vehicle, except in cases where more than two traffic lanes have been properly laid out and marked for such purpose, or where one-way streets have been formally designated, with provisions for passing on either side.

COURTS: JUVENILE; MOTOR VEHICLE LAWS; JURISDICTION

30 March 1948

In North Carolina, the operator of a motor vehicle who is more than fifteen years of age is subject to the criminal jurisdiction of our recorder's courts or the Superior Court. If, however, the offending operator is less than fifteen years of age, our juvenile courts would have jurisdiction.

COUNTIES: COUNTY HOSPITALS; USE OF SURPLUS A.B.C. FUNDS FOR ERECTION OF HOSPITAL

30 March 1948

Surplus funds of a county, derived solely from the operation of A.B.C. stores in the county, may be appropriated by a board of county commissioners for the purpose of supplementing other funds available for the acquisition or construction of a county hospital.

A.B.C. STORES: ELECTIONS

31 March 1948

Under our statutes, no election on the question of A.B.C. stores may be held within three years from the holding of the last such election in the same voting territory.

PHYSICIANS: DUTY TO REPORT DEATHS FROM VIOLENT
OR ACCIDENTAL CAUSES

24 March 1948

In cases of injury resulting in death which come to the professional attention of physicians, such physicians are under legal as well as moral obligation to report all suspicious or criminal aspects of such cases to the coroner or other officer.

SCHOOLS: CAPITAL OUTLAY; COUNTY COMMISSIONERS FIX
BUDGET ON APPLICATION OF

1 May 1948

Under our school laws, it is the duty of the county board of education, in respect to county administrative units, and the board of trustees in respect to city administrative units, to present their respective capital outlay needs to the board of county commissioners, in due time to allow such board to provide the necessary funds for such units.

SALE OF AIR RIFLES: SALES TAX

2 May 1948

We have no statutory provisions against the sale of air rifles, but such sales are subject to the usual 3% sales tax under our Revenue Act.

INTOXICATING LIQUOR: SEARCH OF MOTOR VEHICLES
WITHOUT SEARCH WARRANTS

5 May 1948

A search warrant should be secured before a motor vehicle is searched for the illegal transportation of liquor, unless the officer sees or has absolute personal knowledge of the illegal transportation of liquor.

CORONERS: SERVICE OF PROCESS WHEN SHERIFF IS A PARTY

5 May 1948

In cases where a sheriff is a party to an action at law, our statutes provide that the coroner shall serve all legal process and perform such other duties in connection with the case as would ordinarily be performed by the sheriff.

SCHOOLS: EMERGENCY TEACHERS; CONTINUANCE OF CONTRACTS

9 May 1948

Under our school laws, contracts made with emergency or substitute teachers are upon a temporary basis, and do not continue from year to year, and do not require notice of release or rejection.

JUSTICES OF PEACE: RETENTION OF COMMISSION OF \$2.00 COLLECTED FOR
LAW ENFORCEMENT OFFICERS FUND; COMMISSION ON
FINES AND FORFEITURES

12 May 1948

A justice of the peace has no right to charge or retain any commission on the \$2.00 item of cost assessed for the Law Enforcement Officers Fund, nor upon any fines or forfeitures collected by him and paid over to the county school fund.

SCHOOL SUPPLEMENT ELECTIONS

12 May 1948

In the absence of a public-local act specifically authorizing it, a school district having a school population of less than one thousand cannot hold a supplemental school tax election.

**REPORT OF THE DIRECTOR OF
THE BUREAU OF INVESTIGATION
TO THE
ATTORNEY GENERAL FOR THE BIENNIUM
JULY 1, 1946 TO JULY 1, 1948**

The Bureau of Investigation, North Carolina Department of Justice, as now constituted was established on July 1, 1939. This report covers the eighth and ninth years of its activities.

Beginning with the fiscal year 1946 the work of the Bureau of Investigation was carried on with a personnel consisting of nine special agents, four members of the headquarters staff and the Director. During the three previous months many requests had come to our Bureau for assistance and we were unable to render assistance because of the lack of personnel. This matter was called to the attention of the Attorney General and the Governor of North Carolina and they recommended to the Budget Commission that additional special agents be employed in the Bureau. As a result of their recommendation, the General Assembly of 1947 appropriated funds for the employment of three additional senior investigators, three junior investigators, and one identification officer. These appropriations became operative with the 1947 fiscal year.

During the 1947 fiscal year we were able to employ the new personnel granted and a glance at the work completed evidences not only the need of additional personnel but also evidences the fact that the employment of this additional personnel has been highly beneficial to the citizens of this State. During the fiscal year 1946-1947 the Bureau investigated 324 new cases, closing 148; investigated 100 old cases, closing 46. During the fiscal year 1947-1948 the Bureau investigated 685 new cases, closing 473; investigated 207, closing 111. The Bureau also investigated and closed 188 miscellaneous cases. The services of the Bureau were requested in 91 counties out of the 100 in the State.

In addition to our investigative work the technical services of our Bureau were used in 870 instances in the 1946-1947 fiscal year and 1203 instances during the 1947-1948 fiscal year. We are now able to render fingerprint examinations, medico-legal examinations, psychograph tests, microscopic examinations, photographic service, ultra violet ray examinations, and have sound equipment for special recordings. Our chemical analyses are conducted by Dr. H. M. Taylor, Toxicologist of Duke University.

The Bureau of Investigation is now acting as a clearing house for the various law enforcement agencies in North Carolina and each Monday a bulletin is mailed to each chief of police, each sheriff, the Federal Bureau of Investigation, Secret Service, Post Office Inspectors, Railroad Police, State Highway Patrol, A.B.C. Enforcement Officers, the solicitors of each judicial district, narcotic agents, and to the law enforcement agencies of Virginia, West Virginia, Tennessee, Georgia, and South Carolina. In this way the serious crimes committed in the State, in which individuals are

known or property taken, are called to the attention of the various agencies and through this medium the agencies in the various sections of the State know what is happening in the other sections of the State and know who is wanted and what property has been stolen.

Already, this service has paid great dividends in the recovery of property, the apprehension of criminals, and the uniting of cooperation among the various law enforcement agencies throughout the State.

On behalf of the Special Agents, the Staff, and myself, I wish to express grateful appreciation for the excellent cooperation rendered us by the administrative officers, judges, solicitors, law enforcement officers, and the law abiding citizens of the State of North Carolina.

The following classification of crime has been adopted by the Bureau and all cases received and investigated have been assigned thereunder:

CRIME CLASSIFICATION

- A. Assault
 - 1. Simple
 - 2. A.D.W. with Intent to Kill
 - 3. Assault with Intent to Commit Rape
 - 4. All Others
 - 5. Hit and Run
- B. Burglary-Breaking
and Entering
 - 1. First Degree (occupied)
 - 2. Second Degree (unoccupied-safecracking)
- E. Embezzlement-
Fraud
 - 1. Embezzlement
 - 2. Forgery
 - 3. Worthless Checks
 - 4. Extortion
 - 5. All Others
- H. Homicide
 - 1. First Degree Murder
 - 2. Second Degree Murder
 - 3. Manslaughter
 - 4. Suspicious Death
- L. Larceny
 - 1. Auto
 - 2. All Others
- R. Robbery (Person)
- S. Sex Offenses
 - 1. Rape
 - 2. Abortion
 - 3. Adultery and Fornication
 - 4. Bastardy
 - 5. Bigamy
 - 6. Buggery
 - 7. Incest
 - 8. Prostitution
 - 9. Seduction
 - 10. All Others

- M. Miscellaneous
1. Arson
 2. Bribery
 3. Buying or Receiving Stolen Property
 4. Conspiracy
 5. Perjury
 6. Possession Burglar Tools
 7. Trespass
 8. Unlawful Use or Possession Explosives
 9. Weapons
 10. Abandonment and Non-Support
 11. Escape
 12. Abduction
 13. Poisoning
 14. Resisting Arrest
 15. Riot
 16. Anonymous Letters
 17. Pure Food and Drug Laws
 18. Prohibition Laws
 19. Motor Vehicle Laws
 20. Gambling and Lottery
 21. Parole Violation
 22. Probation Violation
 23. Election Laws
 24. All Others

The following statement shows new, old, and miscellaneous cases investigated and closed for each month during the period from July 1, 1946 to July 1, 1947:

	NEW CASES		OLD CASES		MISCELLANEOUS CASES
	<i>Investigated</i>	<i>Closed</i>	<i>Investigated</i>	<i>Closed</i>	<i>Investigated and Closed</i>
July	33	11	9	2	18
August	30	16	4	0	13
September	30	18	7	3	23
October	37	13	10	8	16
November	29	11	9	5	16
December	25	13	8	5	14
January	27	17	7	1	27
February	26	12	10	7	20
March	24	10	9	6	16
April	22	7	10	2	23
May	20	9	10	5	13
June	21	11	7	2	9
Totals	324	148	100	46	208

The following statement shows new, old, and miscellaneous cases investigated and closed for each month during the period from July 1, 1947 to July 1, 1948:

	NEW CASES		OLD CASES		MISCELLANEOUS CASES
	<i>Investigated</i>	<i>Closed</i>	<i>Investigated</i>	<i>Closed</i>	<i>Investigated and Closed</i>
July	27	15	12	2	26
August	35	30	19	12	21
September	42	28	12	9	18
October	54	40	17	8	15
November	60	45	17	12	12
December	54	46	12	6	6
January	77	52	13	4	20
February	64	48	19	12	13
March	64	46	25	15	10
April	57	38	27	14	15
May	72	40	25	12	15
June	79	45	9	5	17
Totals	685	473	207	111	188

July 1, 1946 to July 1, 1947

The following statement shows the number of requests received by counties and the classification of the type of crime investigated therein:

Counties	Assault	Burglary	Embezzle- ment	Homicide	Larceny	Robbery	Sex Offenses	Misc.	Totals
Alamance		3	4	1	1				9
Alexander								1	1
Alleghany	1	1					1		3
Anson		2							2
Ashe									0
Avery									0
Beaufort		1		1	1				3
Bertie									0
Bladen		1						2	3
Brunswick	1							1	2
Buncombe									0
Burke		2	1						3
Cabarrus	1	3	1	1	1	1	1		9
Caldwell								1	1
Camden	1								1
Carteret		6		1	1			1	9
Caswell		2		1					3
Catawba		1	1				1	1	4
Chatham		5		1	3				9
Cherokee									0
Chowan									0
Clay		1							1
Cleveland			1						1
Columbus				1	1			2	4
Craven									0
Cumberland	1	1							2
Currituck									0
Dare									0
Davidson	1	6			2	1	1		11
Davie	2	1							3
Duplin		5	2				1		8
Durham		1			1			1	3
Edgecombe				1					1
Forsyth		2	2				1	1	6
Franklin	1	2			1			1	5
Gaston			1	1	1				3
Gates			1						1
Graham									0
Granville		3		1	1				5
Greene									0
Guilford			1	1	1			2	5
Halifax		1						1	2
Harnett		1	1						2
Haywood								1	1
Henderson									0
Hertford		1	1						2
Hoke									0
Hyde								1	1
Iredell	1	1	1	2				2	7
Jackson				2					2
Johnston		3		1				2	6
Jones		2							2
Lee		4	1	1					6

July 1, 1946 to July 1, 1947

The following statement shows the number of requests received by counties and from what sources requests were made:

Counties	Sheriffs Depts.	Police Depts.	Highway Patrol	Solicitors	Judges	Executive Depts.	Coroners	Misc.	Totals
Alamance	4	4						1	9
Alexander		1							1
Alleghany	3								3
Arson	1	1							2
Ashe									0
Avery									0
Beaufort	2	1							3
Bertie									0
Bladen	1					1		1	3
Brunswick				2					2
Buncombe									0
Burke		2						1	3
Cabarrus	3	6							9
Caldwell						1			1
Camden	1								1
Carteret	7	1		1					9
Caswell	3								3
Catawba	1	2		1					4
Chatham	6	1	2						9
Cherokee									0
Chowan									0
Clay	1								1
Cleveland	1								1
Columbus	3	1							4
Craven									0
Cumberland	1	1							2
Currituck									0
Dare									0
Davidson	5	6							11
Davie	2							1	3
Duplin		8							8
Durham		1				1		1	3
Edgecombe		1							1
Forsyth	2	4							6
Franklin	4					1			5
Gaston		1		1		1			3
Gates						1			1
Graham									0
Granville	3	1	1						5
Greene									0
Guilford	3					1		1	5
Halifax	1	1							2
Harnett	1	1							2
Haywood				1					1
Henderson									0
Hertford		1	1						2
Hoke									0
Hyde								1	1
Iredell	5	1						1	7
Jackson	2								2
Johnston	2	3	1						6
Jones	2								2
Lee	4	2							6

July 1, 1947 to July 1, 1948

The following statement shows the number of request received by counties and the classification of the type of crime investigated therein:

Counties	Assault	Burglary	Embezzle- ment	Homicide	Larceny	Robbery	Sex Offenses	Misc.	Totals
Alamance	2	13					2		17
Alexander		13		3	2			1	19
Alleghany	1	3		2				1	7
Anson		3						2	5
Ashie		3		3					6
Avery		2	1			1		1	5
Beaufort		5						2	7
Bertie									0
Bladen		1	1	3				1	6
Brunswick		4		3		1			8
Buncombe		3							3
Burke		6	1	3	1		1	2	14
Cabarrus	1	10	10	1	2		1	1	26
Caldwell	2	3	1						6
Camden		3		1					4
Carteret		10		2	4			1	16
Caswell		2							2
Catawba		6	1	2	1			3	13
Chatham		16			2	1		2	21
Cherokee		4	1						5
Chowan		7	1						8
Clay									0
Cleveland		3		2					5
Columbus		2							2
Craven		1		1					2
Cumberland	1	7		3					12
Currituck		1	1					1	2
Dare		1	1						2
Davidson	1	12	4	2	3		1	6	29
Davie		5							5
Duplin		7	1	1					9
Durham		1							1
Edgecombe		3		2				3	4
Forsyth		4		2					5
Franklin		2		1		1		3	10
Gaston		2	1					1	4
Gates		1		1					2
Graham									0
Granville		2							2
Greene		1			1				2
Guilford		4	1			1		5	11
Halifax		2						3	5
Harnett		6		2				3	11
Haywood								1	1
Henderson		1							1
Hertford		3	1						4
Hoke								2	6
Hyde	1				2				3
Iredell	1	4		2	1			2	10
Jackson									0
Johnston		6		3	2			4	15
Jones		3						3	6
Lee		4		1	1	1			10

July 1, 1947 to July 1, 1948

The following statement shows the number of requests received by counties and from what sources requests were made:

Counties	Sheriffs Depts.	Police Depts.	Highway Patrol	Solicitors	Judges	Executive Depts.	Coroners	Misc.	Totals
Alamance	7	8						2	17
Alexander	14	2	1					2	19
Alleghany	5			1		1			7
Anson	3		1	1					5
Ashe	4	1	1						6
Avery	3	1				1			5
Beaufort	5	1		1					7
Bertie									0
Bladen	5	1							6
Brunswick	2	2	1	2			1		8
Buncombe	2	1							3
Burke	9	3		1				1	14
Cabarrus	6	19					1		26
Caldwell	1	4	1						6
Camden	3	1	1						5
Carteret	11	3		2					16
Caswell	1	1							2
Catawba	5	8							13
Chatham	15	2				1		3	21
Cherokee	4	1							5
Chowan	1	5	1	1					8
Clay									0
Cleveland	4	1							5
Columbus	1	1							2
Craven	1	1							2
Cumberland	3	2				1		6	12
Currituck	2								2
Dare	1	1							2
Davidson	9	16	1	2				1	29
Davie	2		1	1				1	5
Duplin	6	3							9
Durham		1		1		1		1	4
Edgecombe	1	3				1			5
Forsyth	4	3	1			2			10
Franklin	2	1		1					4
Gaston	3	1							4
Gates	1							1	2
Graham									0
Granville	1	1							2
Greene	2								2
Guilford	7	1			1			2	11
Halifax	1	4							5
Harnett	9	1	1						11
Haywood	1								1
Henderson						1			1
Hertford	3	3							6
Hoke									0
Hyde	3								3
Iredell	5	5							10
Jackson									0
Johnston	8	3		1		2		1	15
Jones	6								6
Lee	7	2						1	10

TOTAL TYPES OF CRIMES INVESTIGATED IN VARIOUS COUNTIES

	1946-47	1947-48
Assault	21	26
Burglary	151	355
Embezzlement	25	57
Homicide	39	84
Larceny	26	56
Sex Offenses	19	9
Miscellaneous	43	98
	<hr/>	<hr/>
Total	324	685

TOTAL REQUESTS FROM LAW ENFORCEMENT AGENCIES

	1946-47	1947-48
Sheriff's Departments	168	354
Police Departments	91	223
Highway Patrol	9	15
Solicitors	23	21
Judges	—	2
Executive Departments	16	26
Coroners	3	5
Miscellaneous	14	39
	<hr/>	<hr/>
Total	324	685

The following statement shows the volume of work performed by the Technical Division for each month during the period from July 1, 1946 to July 1, 1947:

	1946						1947						TOTAL
	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APRIL	MAY	JUNE	
Fingerprint Examinations	6	5	20	21	12	20	25	20	25	25	26	17	222
Firearms Examinations	2		2	2	2	1	1	1		1	2	1	15
Document Examinations	3	2	3	2	2	3	5	3	3	5	3	2	36
Medico-Legal Examinations	4		3	1	3	5	3	1	1		1		22
Psychograph Tests		1		1	1	1	1		5	3	1	3	17
Microscopic Examinations													0
Photographs Printed	31	37	37	46	39	51	65	49	60	51	51	37	554
Ultra-Violet Ray Examinations			1			1			1		1		4
Sound Equipment													0
Totals	46	45	66	73	59	82	100	74	95	85	85	60	870

The following statement shows the volume of work performed by the Technical Division for each month during the period from July 1, 1947 to July 1, 1948:

	1947						1948						TOTAL
	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APRIL	MAY	JUNE	
Fingerprint Examinations	18	21	21	35	31	25	36	51	29	21	36	42	366
Firearms Examinations	2	1	3	3	4	1	3	1	1	1		1	21
Document Examinations	2	2	1	2	3	4	2	3	1	2	2	4	28
Medico-Legal Examinations	2	1	2	4	6	2	4	3	6	4	2	6	42
Psychograph Tests	4	8	6	7	5	45	6	26	9		12	14	142
Microscopic Examinations													0
Photographs Printed	46	55	56	53	52	55	53	51	53	45	48	36	603
Ultra-Violet Ray Examinations							1						1
Sound Equipment													0
Totals	74	88	89	104	101	132	105	135	99	73	100	103	1203

The following statement shows the source of requests and types of work performed by the Technical Division during the period from July 1, 1946 to July 1, 1947.

1946-1947

	Sheriffs Depts.	Police Depts.	High- way Patrol	Solici- tors	Judges	Execu- tive Depts.	Cor- oners	Misc.	Total
Fingerprint Examinations.....	112	107	3						222
Firearms Examinations.....	9	4	1					1	15
Document Examinations.....	5	15		2		8		6	36
Medico-Legal Examinations.....	16	4		1		1			22
Psychograph Tests.....	4	11				2			17
Microscopic Examinations.....									
Photographs Printed.....	114	112	15			37		276	554
Ultra-Violet Ray Examinations.....		3						1	4
Sound Equipment.....									
Totals.....	260	256	19	3	0	48	0	284	870

The following statement shows the source of requests and types of work performed by the Technical Division during the period from July 1, 1947 to July 1, 1948.

1947-1948

	Sheriffs Depts.	Police Depts.	High- way Patrol	Solici- tors	Judges	Execu- tive Depts.	Cor- oners	Misc.	Total
Fingerprint Examinations.....	215	142	8	1				5	371
Firearms Examinations.....	18	2						1	21
Document Examinations.....	13	4				7		3	27
Medico-Legal Examinations.....	20	11				2	5	4	42
Psychograph Tests.....	77	12				3		47	139
Microscopic Examinations.....									
Photographs Printed.....	179	139	28			29		227	602
Ultra-Violet Ray Examinations.....	1								1
Sound Equipment.....									
Totals.....	523	310	36	1	0	41	5	287	1203

**BRIEF SUMMARY
OF A FEW
CASES INVESTIGATED
DURING PERIOD
JULY 1, 1946 TO JULY 1, 1948**

*State v. J. G. Etheridge
Violation of Marriage Laws*

On the basis of repeated rumors of violation with regard to the marriage laws of North Carolina, taking place in the office of J. G. Etheridge, Register of Deeds, Camden County, the Honorable Chester R. Morris, Solicitor of the First Judicial District, requested that the State Bureau of Investigation make an investigation into this matter.

A check of the records in the office of the Register of Deeds revealed a number of irregularities and when confronted with these, Mr. J. G. Etheridge, Register of Deeds, admitted that it was a customary practice of his office to issue marriage licenses and marry the couples, although they did not present certificates of serological examinations and health certificates at the time. At a later date, Dr. S. G. Wright of Camden County would make out the serological and health certificates without ever having examined the individuals and these records would then become a part of the files.

On the basis of these findings, J. G. Etheridge was charged on 25 counts of violation of the State Marriage Laws. On August 24, 1946, in the Recorder's Court of Camden County, J. G. Etheridge plead guilty to 23 of the 25 counts and was fined \$300 and cost; Judge R. L. Whaley of Camden County Court, presiding.

*State v. Mrs. Wilma Haliburton Wheeler
Union National Bank, Victim—Forgery*

On June 6, 1946, the Union National Bank of Lenoir, N. C., honored two drafts drawn on the Western Union Telegraph Company, each in the amount of \$800, payable to Mrs. Lois Mull. It later developed that these drafts were forgeries. The assistance of the S.B.I. was requested by Solicitor Folger Townsend.

Investigation revealed that the two Western Union Drafts were typed on a billing typewriter located in the Drexel Furniture Company in Burke County. Further investigation revealed that Mrs. Wilma Haliburton Wheeler, a discharged employee of the Western Union, had visited a friend of hers in the Western Union Office in Morganton, N. C., and at that time would have had an opportunity to have stolen the blank money order drafts. Specimens of Mrs. Wheeler's handwriting were obtained and an examination revealed that Mrs. Wheeler was apparently the author of the signatures, "Lois Mull," appearing on the drafts in question.

At the August term of Superior Court of Caldwell County, Mrs. Wheeler plead guilty to forgery and was sentenced to three to five years in State Prison; Honorable Hoyle Sink presiding. Judgment in this case was suspended for five years on condition that the defendant be of good behavior for said period and that she pay the court cost.

*State v. Benjamin F. McLeod, alias, Frank McLeod
Henry Lowery, Fannie Lowery, William Lowery and
Edward Koonce, Victims—Murder*

On the night of July 1, 1946, the home of Henry Lowery, located about 15 miles from Laurinburg was discovered in flames. The fire had progressed so far that nothing could be done. Later it was discovered that Henry Lowery, his wife, Fannie Lowery, and his eighteen months old child, William Lowery, and Edward Koonce who lived with the Lowerys all perished in the flames. As foul play was suspected, Sheriff W. D. Reynolds, of Scotland County, requested that the S.B.I. assist in this matter.

Investigation was made very difficult by virtue of the fact that all the evidence had been consumed in the flames; however, as a result of an intensive investigation, one Frank McLeod was arrested and interrogated in connection with this crime. Upon interrogation, McLeod admitted that he had entered the Lowery home where he murdered Mrs. Lowery, their eighteen months old baby, William Lowery, and Edward Koonce. He then waited in the kitchen several hours until Henry Lowery returned home, at which time he shot him as he entered the house. He then set fire to the dwelling.

At the December, 1946, term of Superior Court, McLeod was found guilty of murder in the first degree and sentenced to death in the gas chamber; Honorable F. M. Armstrong, presiding. On May 23, 1947, McLeod was executed in the gas chamber at Central Prison.

*State v. Alvester Bell
Cole Furniture Company, Victim—Breaking and Entering*

On the night of December 30, 1946, the Cole Furniture Company, of Woodland, N. C., was entered and \$30 stolen therefrom. Entry was made by breaking a rear window.

Chief of Police Frank Outland requested the assistance of the S.B.I. in this matter, and a latent fingerprint was developed on broken glass at the scene of the crime. On March 10, 1947, Chief Outland forwarded to the Bureau a set of prints of an individual who had been apprehended the night before attempting to break into a service station. Comparisons of these prints with the latent prints found at the scene of the Cole Furniture Company showed latent print to be the left index finger of Alvester Bell.

At the April, 1947, term of Superior Court in Northampton County, Alvester Bell plead guilty to the breaking and entering of the Cole Furniture Company and was sentenced to a term of eight months on the road by the Honorable Henry Stevens, Judge, presiding.

State v. Willie Cherry and James Boone
Mrs. J. G. Tarrant, Victim—Rape and Robbery

On Friday night, April 25, 1947, at approximately midnight, the home of Mrs. J. G. Tarrant was entered by a negro man. Entrance was made by cutting the screen to the dining room located in the front of the house. This negro raped Mrs. Tarrant and then forced her to give him the contents of her pocketbook. Chief of Police Frank Outland of Rich Square requested the assistance of the State Bureau of Investigation in this matter.

In the struggle with her assailant, Mrs. Tarrant tore from his clothing a black button and a blue button. As a result of an investigation of this matter, two negroes, Willie Cherry and James Boone were arrested. Upon interrogation, Willie Cherry admitted that he and James Boone had been together on the night in question and had been drinking and that James Boone had urged him to enter the Tarrant house and commit the assault and robbery. Cherry also stated that Boone had assisted him in cutting the screen to the dining room window and in aiding him in his entry through this window. In addition, clothing found in Cherry's room had buttons similar to the two buttons found in the Tarrant kitchen. Although confronted with Cherry's statement, Boone continued to steadfastly deny any connection whatsoever with the crime. Boone was brought to the Bureau offices in Raleigh and subjected to lie detector tests. When confronted with the results of these tests, Boone admitted his participation in the crime.

At the June term of Superior Court in Northampton County, Willie Cherry was found guilty of rape and burglary in the first degree and was sentenced by Judge W. H. S. Burgwyn to be executed in the gas chamber at State Prison. James Boone was found guilty of burglary in the first degree and, taking into consideration the recommendation for mercy, Judge Burgwyn sentenced Boone to life imprisonment. On October 3, 1947, Willie Cherry was executed in the gas chamber at Central Prison.

State v. James Aiken
Bank of Reidsville, Victim—Larceny

During the month of June, 1947, the Bank of Reidsville was renovating their first floor quarters and carrying on business in the basement. On May 25, 1947, an audit of the books showed everything to be in order. A similar audit on June 2, 1947, showed a shortage of exactly \$5,000. On Thursday, May 29th, a large sum of cash was moved from the main vault into the basement in order to count out the payroll for the American Tobacco Company. On June 2, 1947, cash in the main vault on the first floor was moved to two new vaults which had just arrived and were in the basement. As the amount missing was exactly \$5,000, it was believed that a banded package of bank notes was either lost, misplaced or stolen during one of these moves.

On June 20, 1947, Chief of Police R. W. Turkelson, of Reidsville, N. C., brought to the Bureau, James Aiken, negro, male, janitor in the bank and another employee in the bank for psychographic tests. Psychograph tests were run on these two individuals and due to the nature of the charts,

Chief Turkelson was advised that an opinion would be forwarded to him at a later date. On the following day, Chief of Police Turkelson called the Bureau and advised that upon their return to Reidsville, James Aiken had called the President of the Bank and stated that he wished to admit the theft of the \$5,000 before the S.B.I. sent in their report on the matter. Aiken was tried in the Federal Court at Salisbury and sentenced to five to seven years.

*State v. George Ben Lewis, alias James Knight
James Henry Davis, Victim—Murder*

On the morning of August 29, 1947, James Henry Davis, colored, was reported missing from his home. On August 31, 1947, Davis's body was found approximately a mile and a half from his home in a swamp with part of his head blown away. Sheriff Roy Shearin of Warren County, requested the assistance of the State Bureau of Investigation in the investigation of this matter.

Preliminary investigation revealed that the most likely suspect, George Ben Lewis, alias Jack Knight, had left Warrenton hurriedly on Friday morning, August 29, 1947. Further investigation revealed that Lewis's wife, Effie, had wired his mother in Warren County to send her \$40 c/o General Delivery, Coatsville, Pennsylvania, and that on September 5th a Special Delivery letter had been sent by the parents of Lewis to James Knight, General Delivery, Coatsville, Pennsylvania. Chief of Police R. J. Hume, of Coatsville, Pennsylvania, was contacted and requested to apprehend Lewis, alias Knight. On September 8, 1947, the Pennsylvania Authorities advised that Lewis had been apprehended, had confessed to the murder of James Henry Davis and had waived extradition to North Carolina.

On September 18, 1947, in the Superior Court of Warren County, Lewis entered a plea of accessory before the fact of murder in the first degree, and this plea was accepted by the State. The Honorable W. C. Harris presiding, sentenced Lewis to life imprisonment.

*State v. Alex Franklin Brown
Mrs. Alex Franklin Brown, Victim—Murder*

On Friday, October 3, 1947, Federal Soil Conservation and Development Agents on the farm of Alex Franklin Brown heard three shots in the Brown home but did not attach any significance to the incident. When the Browns' seven-year-old son came from school about 4:00 p.m. that date, he found his mother lying on the kitchen floor, and he asked his father if she was dead. The father informed the child that she was not dead. Brown, who has the reputation of being an habitual drunkard, and his son slept in the house that night and the following morning, the child went to the home of his aunt and reported what he had observed. The aunt reported the matter to the authorities, and investigation revealed Mrs. Brown had been shot three times and had been dead approximately 20 hours. Sheriff N. B. Todd, of Ashe County, and Cpl. David A. Houston, of the State Highway Patrol, requested the assistance of the S.B.I. in this matter.

Alex Franklin Brown, husband of the deceased, was arrested and charged with first degree murder. Firearms identification examination revealed that the fatal bullets had been fired from a 32 caliber Italian pistol and a 22 caliber rifle which were found in the Brown home.

At the April term of Superior Court in Ashe County, Brown was tried on a charge of first degree murder. As evidence was introduced by the defense which tended to show that the sanity of Brown was questionable, the State accepted a plea of murder in the second degree and Brown was sentenced to life imprisonment; the Honorable W. H. Bobbitt, presiding.

State v. Charlie Holden, Rudolph Chavis, Charles Williams, Rufus Wooten and Whitfield Fowler; Nance Wholesale Company, et als.,
Victim—Safe Burglary

During the Fall of 1947 and the Winter of 1948, a number of safe robberies occurred in Central and Eastern North Carolina. An analysis of these crimes revealed the same modus operandi and further showed that practically all of the crimes were centered within a radius of 100 miles of Raleigh. It appeared to be the work of professionals as they always wore gloves, stole the tools used in breaking the safes and then left the tools on the job. After a series of such safe burglaries occurred in Sanford, N. C., the assistance of the S.B.I. was requested by Chief of Police Paul Watson of Sanford. Investigation revealed that the gang was apparently operating out of Raleigh and that they would leave Raleigh on an evening, pull a job and then return to Raleigh in the same night. As a result of further investigation, Charlie Holden, Rufus Wooten, Charles Williams and Whitfield Fowler were arrested. After interrogation by members of the Sanford Police Department and Agents of the S.B.I., these men admitted burglarizing a number of safes in Central North Carolina.

At the March term of Superior Court in Lee County, all parties plead guilty to breaking, entering, larceny and conspiracy and Rudolph Chavis was given a sentence of two years in the State Prison, Charles Williams was given seven years, Rufus Wooten was given ten years and Whitfield Fowler was given four years.

At the March term of Superior Court in Scotland County, Charlie Holden and Rufus Wooten were convicted of safe burglary and Wooten was given from three to four years in the State Prison and Charlie Holden was given three and one-half to five years in the State Prison.

State v. James Leroy Jackson
David Houck Francum, Victim—Murder

On the night of November 18, 1947, David Houck Francum was shot through the abdomen as he stood on the edge of his front porch. The weapon used was a shot gun loaded with a single rifled slug such as is sometimes used for hunting bear, deer and similar game. The victim's wife, hearing the shot, went to the front porch to assist her husband and the perpetrator of this crime hit her over the head several times with a blunt instrument. When she regained consciousness, she dragged her husband

into the house where he died approximately two hours later. Both Francum and his wife are nearly blind and as a result Mrs. Francum was afraid to leave the house to get aid until the following morning. The time of the assault was approximately 9:30 p.m. The victim was also robbed. Sheriff Ray A. Sigmon requested the assistance of the S.B.I. in the investigation of this matter.

As a result of investigation, one James Leroy Jackson, negro, was arrested and articles belonging to the victim were found in his possession. In addition, an unusual firearms identification was effected. Jackson had sawed off approximately one or two inches of the barrel of his shotgun at the muzzle and had then drilled another hole in which to mount the front sight. As a result, the metallic burrs left around this hole marked each slug passing through the barrel with very distinctive and significant markings. In the light of the evidence against him, Jackson confessed to the Officers of the Sheriff's Department and S.B.I. Agent.

At the December term of Superior Court in Burke County, Jackson was found guilty of murder in the first degree and sentenced to death in the gas chamber; the Honorable Allen H. Gwyn, presiding. On May 7, 1948, Jackson was executed in the gas chamber at Central Prison.

State v. Dan Poston
Mildred Peele, Victim—Murder

On the night of August 9, 1947, Mildred Peele was sitting in a car parked beside a roadhouse filling station operated by Dan Poston in Richmond County. A shot was fired from an upper story window, going through the top of the car and into the head of Mildred Peele, causing death.

Sheriff Carl Holland, of Richmond County, submitted to the Bureau a P-38 German Automatic pistol and a metal fragment removed from the head of Mildred Peele for examination. Examination and tests revealed that the metal fragment removed from the head of Mildred Peele was fired in the P-38 German Automatic pistol, owned by Dan Poston and submitted by Sheriff Holland for examination.

At the December, 1947, term of Superior Court in Richmond County, Dan Poston was found guilty of manslaughter and sentenced to eight to ten years.

State v. Virginia Smith Swain
W. E. Stewart, et als., victims—False Pretense

During the months of January, February and March, 1948, several residents of Concord, N. C., received long distance telephone calls from an unknown female stating that she was a Concord girl and stranded with three children and requesting money in order that she might return to her relatives in Concord. Several of the local citizens responded to her plea. When it became evident that this was a fraud, Chief of Police B. A. Robinson, of Concord, N. C., requested that the Bureau assist in the investigation of this matter.

Investigation revealed that the individual making these calls was probably Virginia Smith Swain, nee Virginia Smith. An effort was made to apprehend Virginia Swain in Gastonia, N. C., but it was found that she had departed Gastonia several days before and her whereabouts were unknown. On March 31st, another Concord resident received a telephone call from Augusta, Georgia, from a woman stating that she was Virginia Swain and requesting that he wire her \$10 in order that she might return to Concord. The Augusta Police Department was requested to apprehend Virginia Swain when she called at the Western Union Office.

Virginia Smith Swain was returned to Concord on April 1, 1948, and on April 8, 1948, she plead guilty to forceful trespass in Cabarrus County Recorder's Court and was sentenced to twelve months. The sentence was suspended for a period of eighteen months on the condition that she not violate any laws of the State and make refunds to the victims.

CRIMINAL STATISTICS

THE CRIMINAL RECORDS OF THE
CITY OF NEW YORK, 1890-1891
CONTAINING THE NAMES OF THE
CRIMINALS, THE NATURE OF THE
CRIMES, AND THE RESULTS OF THE
PROSECUTIONS, AS REPORTED BY
THE DISTRICT ATTORNEY, AND
THE JUDGES OF THE COURTS.
PUBLISHED BY THE
OFFICE OF THE DISTRICT ATTORNEY,
NEW YORK.

CRIMINAL STATISTICS

REPORT OF THE DIVISION OF CRIMINAL AND CIVIL STATISTICS

The following tables of statistics present a general summarization of all criminal cases reported to the Department of Justice by the one hundred Clerks of the Superior Court and the clerks of all courts of record below the Superior Court, including all General County Courts, all Recorder's Courts, and all Municipal Courts except those presided over by a mayor.

These reports are required to be filed with this department by the provisions of Chapter 315 of the Public Laws of 1939, and taken all together cover the final disposition of all criminal cases coming before all courts with the exception of such minor offenses as fall within the jurisdiction of Justices of the Peace and mayors of cities or towns.

The tabulations are arranged alphabetically by counties within the twenty-one Judicial Districts, and are in large measure self-explanatory. The first series of tables covers the Superior Court, the second covers the Inferior Courts, and a summarization containing an alphabetical list of crimes follows each series of tables.

A reference to these two summarizations will show a grand total of 31,145 criminal cases disposed of in the Superior Court during the calendar years 1946 and 1947, as compared with a grand total of 22,071 in the Superior Court for the preceding years of 1944 and 1945.

In the Inferior Courts of record, the 1946 and 1947 Biennium shows a grand total of 306,239 criminal cases disposed of, as against 194,521 for 1944 and 1945.

Combining all criminal cases from the Superior Court and the Inferior Courts of record, we have an overall total of 337,384 for the calendar years 1946 and 1947 against an overall total of 216,592 for the calendar years of 1944 and 1945.

It is apparent that in both the Superior and the Inferior Courts there has been a marked increase in the number of cases reported, and no explanation or analysis of this upsurge will be undertaken here, other than to suggest that it appears to be reasonably in line with the national trend, and characteristic of post-war periods generally.

The Division of Criminal and Civil Statistics, as the name implies, also collects data on the trial of civil actions in the Superior Court, but as no civil statistics are now required of Inferior Courts, it is not felt that any general analysis should be attempted here. These civil statistics, submitted by the Clerks of the Superior Court, are of permanent value in themselves as reflecting the case load and the volume and status of the litigation in the several Judicial Districts. However, these figures are not considered comprehensive enough to serve as a proper basis for general conclusions at this time.

[illegible]

Larceny by trick and receipt									
Larceny of automobile.....	1							7	1
Temporary larceny.....									
Murder—first degree.....	3	5		1					3
Murder—second degree.....									1
Manslaughter.....									
Burglary—first degree.....	1		1					1	4
Burglary—second degree.....	1								1
Abandonment.....									
Abduction.....	3							1	
Affray.....				4					
Arson.....									
Bigamy.....	1	1						1	1
Bribery.....		1							
Burning other than arson.....									
Carrying concealed weapon.....		2			1				4
Contempt.....									
Conspiracy.....									
Cruelty to animals.....									
Disorderly conduct.....					1				
Disorderly house.....									
Disposing of mortgaged property.....									
Disturbing religious worship.....									
Violation of election laws.....									
Embezzlement.....	1	2						1	1
Escape.....			1					3	
Failure to list tax.....									
Food and drug laws.....									
Fish and game laws.....					3	2			
Forcible trespass.....		1							1
Forgery.....	4	2	12		1	2		15	3
Fornication and adultery.....	1	1							1
Gaming and lottery laws.....									
Health laws.....								1	
Incest.....									
Injury to property.....									
Municipal ordinances.....					1			1	
No support.....	5	1						1	2
No support of illegitimate child.....		1							2

FIRST JUDICIAL DISTRICT—Continued IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Nuisance.....																				
Official misconduct.....																				
Perjury.....																				
Prostitution.....																				
Rape.....																				
Receiving stolen goods.....																				
Removing crop.....																				
Resisting officer.....	2	1																		
Robbery.....	4				2															
Seduction.....		1																		
Slander.....																				
Trespass.....																				
Vagrancy.....					2		2													
Worthless check.....							1													
False pretense.....	1																			
Carnal knowledge, etc.....	1				3		1													
Crime against nature.....																				
Slot machine laws.....																				
Kidnaping.....																				
Revenue act violations.....																				
Miscellaneous.....	13	4			1		1										3			
Totals.....	127	6	113	6	1	54	39	4				2	116	2	153	6	36	1	25	1

Convictions.....253

Convictions.....

277

Nolle pros.....

Nolle pros.....

31

Acquittals.....

Acquittals.....

27

Other dispositions.....

Other dispositions.....

6

352

341

SECOND JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS														
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	
Assault.....	6									4	5						8										6			10	1		
Assault and Battery.....	1																																
Assault with deadly weapon.....	8									8	1						5										13			16	2		1
Assault on female.....	4									2	4						2										3			7			
Assault with intent to kill.....	1																4									4			5	2			
Assault with intent to rape.....	1									1	3						2										2			1			
Assault—Secret.....											1						1									1			1				
Drunk—drunk and disorderly.....	13									12	4						15			6						16	1		3				
Possession—illegal whiskey.....																														1			
Possession for sale—sale.....																											1						
Manufacturing— possession of material for.....																											3						
Transportation.....	4									3	6						1			10	1					5			4				
Violation liquor laws.....	9									4									16	1	5					1	20		2				
Driving drunk.....	3									6	2								3	4						1	11		2			1	
Reckless driving.....	6																		4		1					2	2		2				
Hit and run.....																			3	1						2	2		1				
Speeding.....	2																			1						3			1				
Auto license violations.....	1																			2	2					2			1				
Violation Motor Vehicle laws.....	5									5									0		1					1	1		1				
Breaking and entering.....	2									1	1								4	6						2	2		2				
Breaking and entering and larceny.....	5									5	5						6			27	4				4	4		4					
Breaking and entering and receiving.....											2								5	3					1	1		1					
Housebreaking.....																			2	1						1			2				
Housebreaking and larceny.....	1										1						3			11						1							
Housebreaking and receiving.....																																	
Storebreaking and larceny.....																																	
Storebreaking and receiving.....																																	
Storebreaking and receiving.....																																	
Larceny.....	17																										7		21	3			2
Larceny and receiving.....	1																										3	1	15			1	
Larceny from the person.....																											1		7				

Larceny by trick and device.....	2	4				1			1	8			1	2	
Larceny of automobile.....		1												1	
Temporary larceny.....														1	
Murder—first degree.....	4	8	3			2		1					2	2	
Murder—second degree.....									5	1				1	
Manslaughter.....	4	3	1			1			2	11	1		2	2	
Burglary—first degree.....		2							1	6				1	
Burglary—second degree.....	1														
Abandonment.....	1					3				2			1		
Abduction.....						1									
Affray.....														1	
Arson.....		1								7				1	
Bigamy.....	2	2				1			1						
Bribery.....														1	
Burning other than arson.....															
Carrying concealed weapon.....	1	4				1			1	4			1	3	1
Contempt.....															
Conspiracy.....															
Cruelty to animals.....															
Disorderly conduct.....	1	4				1	1	2	1				1	5	1
Disorderly house.....															
Disposit g of mortgaged property.....															
Disturbing relig ius worship.....															
Violation of electio n laws.....															
Enticement.....	4								1	2				6	
Escape.....		2													
Failure to list tax.....															
Food and drug laws.....													1	1	
Fish and game laws.....			1										1	1	
Forcible trespass.....	2	2							5	30			3		
Forgery.....	2	14				8	1	2							
Forfeiture and adultery.....						1	1		1	1			1		
Gaming and lottery laws.....										1				1	
Health laws.....															
Incest.....															
Injury to property.....										2			2	2	
Municipal ordinances.....						4	1		1				2	1	
Nonsupport.....	3	1				4			3	3			1		1
Nonsupport of illegitimate child.....		1							1	6					

SECOND JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS						OTHER DISPOSITIONS					
	CONVICTIONS			OTHER DISPOSITIONS			CONVICTIONS			OTHER DISPOSITIONS		
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
	M	F	M	F	M	F	M	F	M	F	M	F
Nuisance.....												
Official misconduct.....												
Perjury.....												
Prostitution.....	3	1			2	3		1	1	1		
Rape.....		3										
Receiving stolen goods.....	1											
Removing crop.....												
Resisting officer.....	1	1			1	1			1	2		
Robbery.....	6	8			2	1			9	6		
Seduction.....						3						
Slander.....												
Trespass.....		1			1				1	2		
Vagrancy.....						1						
Worthless check.....	4				1							
False pretense.....	2	3				7			2	3		
Criminal knowledge, etc.....	1	1				1			2	6		
Crime against nature.....	1	1			2	2			1			
Shot machine laws.....												
Kidnaping.....	1				1				1			
Revenue act violations.....												
Miscellaneous.....	3	1	1		5	2			1	4		
Totals.....	140	227	23		100	12	98	8	6	4	180	3

Convictions.....	390
Nolle pros.....	159
Acquittals.....	60
Other dispositions.....	9

Convictions.....	397
Nolle pros.....	12
Acquittals.....	142
Other dispositions.....	3

508
248
75
10
841

618

THIRD JUDICIAL DISTRICT

THIRD JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	4		6	1					2								4		2	
Assault and Battery.....																				
Assault with deadly weapon.....	10		25						3		2						3		21	1
Assault on female.....	3		6						1								2		12	
Assault with intent to kill.....	1		9								5						3		3	
Assault with intent to rape.....			5								1						1		8	
Assault—Secret.....			1																2	
Drunk—drunk and disorderly.....	13		3						3								8		5	1
Possession—illegal whiskey.....									1								1		2	
Possession for sale—sale.....			1	2					1										1	
Manufacturing— possession of material for.....									1											
Transportation.....																				
Violation liquor laws.....			1						6		2								1	
Driving drunk.....	7		5						4		1	1					8		1	
Reckless driving.....	1		4								2						4		3	
Hit and run.....	1		2								2								4	
Speeding.....	3		1						1								3			
Auto license violations.....	1		4						1								2		7	1
Violation Motor Vehicle laws.....			1														2			
Breaking and entering.....	4		13								2						4		8	
and larceny.....	11		12								1	1					4		12	
and receiving.....																	8		6	2
Housebreaking.....			1																	
and larceny.....																				
and receiving.....																				
Storebreaking.....																				
and larceny.....																				
and receiving.....																				
Larceny.....	7		13	1					2		4	1					5		10	4
Larceny and receiving.....	1		8								2	1					3		3	2
Larceny from the person.....	3		3						3		1								3	

Larceny by trick and device.....					1	2					4	5				
Larceny of automobile.....	8	4										1				
Temporary larceny.....		1			1						2	6			8	
Murder—first degree.....	3	2	1								1	6				
Murder—second degree.....											3	7	1			
Manslaughter.....	2	1	3			2					1	4				
Burglary—first degree.....											1	2			1	
Burglary—second degree.....												4				
Abandonment.....	1											1				
Abduction.....											3	2				
Affray.....												1				
Arson.....											2	1				
Bigamy.....	1	3	1			1	1					1				
Bribery.....																
Burning other than arson.....																
Carrying concealed weapon.....					1						1	1			1	
Contempt.....																
Conspiracy.....	1				1	1						8			3	
Cruelty to animals.....					3										2	
Disorderly conduct.....		3				1	1				2				1	
Disorderly house.....																
Disposition of mortgaged property.....																
Disturbing religious worship.....																
Violation of election laws.....											1	1				
Embezzlement.....	2										2	2				
Escape.....	2															
Failure to list tax.....																
Food and drug laws.....																
Fish and game laws.....																
Forcible trespass.....	5	8	2								2	1	8	3	1	
Forgery.....	1	5									4	10	1		1	
Fornication and adultery.....																
Gaming and lottery laws.....	3										9	2				
Health laws.....																
Incest.....											6	1				
Injury to property.....																
Municipal ordinances.....																
Nonsupport.....	1				1						8	1			1	
Nonsupport of illegitimate child.....		2										2			1	

THIRD JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947												
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS							
	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified					
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F					
Nuisance.....	1							1															
Official misconduct.....																							
Perjury.....									1														
Prostitution.....																							
Rape.....			2																				
Receiving stolen goods.....																							
Removing crop.....																							
Resisting officer.....			1						1														
Robbery.....			6																				
Seduction.....	1																						
Slander.....																							
Trespass.....			1					1															
Vagrancy.....																							
Worthless check.....																							
False pretense.....	2		2		1				1	1				2									
Carnal knowledge, etc.....																							
Crime against nature.....	3		1					1						1									
Slot machine laws.....																							
Kidnaping.....	3																						
Revenue act violations.....																							
Miscellaneous.....	2	6	4					1															
Totals.....	110	2	175	8	1			42	1	34	7			118	2	212	16	1	50	8			6

Convictions.....	296
Nolle pros.....	49
Acquittals.....	31
Other dispositions.....	4
	380

Convictions.....	349
Nolle pros.....	78
Acquittals.....	38
Other dispositions.....	3
	468

FOURTH JUDICIAL DISTRICT

**FOURTH JUDICIAL DISTRICT
IN SUPERIOR COURT**

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947										
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS					
	White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified	
	M	F	M	F	M	M	F	M	F	M	F	M	M	F	M	F	M	F	M	M	F
Assault.....	9		15	1		1		4	1	3			2		10		5	1			
Assault and Battery.....	1																				
Assault with deadly weapon.....	14		18	4		2		10	1	4			2		13	1	21	1			
Assault on female.....	4	9				2		3		2		1	2		9		5		5	1	
Assault with intent to kill.....	5	13	1			2		2		1			2		2		4	1			1
Assault with intent to rape.....	1	1						2		3					2		2		2		
Assault—Secret.....	1														2				1		
Drunk—drunk and disorderly.....	2	2						1	1						1		3				
Possession—illegal whiskey.....	1		9	2											2		1		1	1	
Possession for sale—sale.....			1												5		1		2		
Manufacturing— possession of material for Transportation.....			1																		
Violation liquor laws.....	8		2	1				2		4					4		3		3	1	
Driving drunk.....	11		3			6		5							23		2				
Reckless driving.....	5		1			2		2					1		4				1		
Hit and run.....	2					2															
Speeding.....	1																				
Auto license Violations.....	3														4						
Violation Motor Vehicle laws.....	1																				
Breaking and entering.....	10	5						1							2		11				
and larceny.....	8	27				1		1		12					17		40		1	4	15
and receiving.....																					2
Housebreaking.....	3	2																			
and larceny.....	4	6								1					17		3			3	
and receiving.....			1																		
Storebreaking.....																					
and larceny.....	1																				
and receiving.....																					
Larceny.....	29	2	40	4		3		4	2	6			1		20		28	3	2		4
Larceny and receiving.....			1												2				1		3
Larceny from the person.....																					

Larceny by trick and device.....	6	4	2	1	1	13	3	5	
Larceny of automobile.....				1	1	5	2	1	
Temporary larceny.....	4	6		1	2	8	7	1	4
Murder—first degree.....	1	4	1			1	3	1	1
Murder—second degree.....	7	4	4	4	1	4	3	2	
Manslaughter.....		1				2	2		1
Burglary—first degree.....							2		
Burglary—second degree.....								1	
Abandonment.....	4	1		1	1	5	1		3
Abduction.....									
Affray.....	4	1							
Arson.....					1				
Bigamy.....	1				1	2	3	2	1
Bribery.....									
Burning other than arson.....									
Carrying concealed weapon.....						2			
Contempt.....									
Conspiracy.....						13	4	1	
Cruelty to animals.....						2			
Disorderly conduct.....		2					1		
Disorderly house.....									
Disposing of mortgaged property.....	2							1	
Disturbing religious worship.....									
Violation of election laws.....	5				1	5		1	1
Embezzlement.....	1	2							
Escape.....								1	1
Failure to list tax.....									
Food and drug laws.....									
Fish and game laws.....									
Fish and game laws.....	4	2		1		7	6		
Forcible trespass.....	7	3		1		19	3	2	1
Forgery.....									
Fornication and adultery.....	2	2	1	1		1	2	2	
Fornication and adultery.....						4	1		1
Gaming and lottery laws.....									
Health laws.....								1	
Incest.....									
Injury to property.....		3							
Injury to property.....	1								
Municipal ordinances.....									
Nonsupport.....	5	2		2	1	7	4	1	4
Nonsupport of illegitimate child.....	2		2	2		2	2		

FOURTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
CONVICTIONS										CONVICTIONS									
OTHER DISPOSITIONS					OTHER DISPOSITIONS					OTHER DISPOSITIONS					OTHER DISPOSITIONS				
White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Nuisance.....	1																		
Official misconduct.....																			
Perjury.....								6									4		
Prostitution.....																			
Rape.....	1																		
Receiving stolen goods.....	1			1				4								1			
Removing crop.....				2															
Resisting officer.....	2			1				2											
Robbery.....	1	6		2	1	4		12							1		1		
Seduction.....	3			1															
Slander.....																			
Trespass.....	16																		
Vagrancy.....				1	1			2									1		
Worthless check.....	4							7	5										
False pretense.....	3							2								2			
Carnal knowledge, etc.....								2								1			
Crime against nature.....																			
Slot machine laws.....																			
Kidnaping.....																2			
Revenue act violations.....																			
Miscellaneous.....	4							8								4			
Totals.....	214	5	208	16			21	66	14	53	4	1	10	1	205	1	194	19	2

Convictions.....	464	Convictions.....	527
Nolle pros.....	76	Nolle pros.....	86
Acquittals.....	69	Acquittals.....	45
Other dispositions.....	4	Other dispositions.....	5
	613		663

FIFTH JUDICIAL DISTRICT

[illegible]

Offense	JANUARY 1, 1946—DECEMBER 31, 1946								JANUARY 1, 1947—DECEMBER 31, 1947																					
	CONVICTIONS				OTHER DISPOSITIONS				CONVICTIONS				OTHER DISPOSITIONS																	
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified															
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F														
Official misconduct.....	1	1							3	1					2	1														
Perjury.....																														
Prostitution.....	2	1																												
Rape.....	1																													
Receiving stolen goods.....																														
Removing crop.....																														
Resisting officer.....	2																													
Robbery.....	1	4							2	3						1														
Seduction.....	2								8							1														
Slander.....																														
Trespass.....	2																													
Vagrancy.....																														
Worthless check.....	7	1							3							3														
False pretense.....	2	1														1														
Carnal knowledge, etc.....		2							2						3	1														
Crime against nature.....	1								1																					
Shot machine laws.....																														
Kidnaping.....																														
Revenue act violations.....																														
Miscellaneous.....																														
Totals.....	150	9	198	11					84	7	56	10			2	207	5	221	8		64	2	91	1	36	2			66	9

Convictions.....	368	Convictions.....	507
Nolle pros.....	99	Nolle pros.....	139
Acquittals.....	51	Acquittals.....	61
Other dispositions.....	9	Other dispositions.....	5
	527		712

Convictions.....	507
Notle pros.....	139
Acquittals.....	61
Other dispositions.....	5
	<hr/>
	712

SIXTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS						
	White		Negro		Indian	Unclas-sified		White		Negro	Indian	Unclas-sified	White		Negro	Indian	Unclas-sified	White		Negro	Indian	Unclas-sified
Assault.....	2	M	F	1	M	F	2	M	F	4	M	F	1	M	F	1	M	F	2	M	F	1
Assault and Battery.....	2	M	F	2	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1
Assault with deadly weapon.....	8	M	F	14	M	F	4	M	F	9	M	F	11	M	F	14	M	F	3	M	F	5
Assault on female.....	2	M	F	3	M	F	2	M	F	3	M	F	3	M	F	9	M	F	2	M	F	1
Assault with intent to kill.....	2	M	F	7	M	F	1	M	F	1	M	F	1	M	F	13	M	F	3	M	F	9
Assault with intent to rape.....	1	M	F	1	M	F	1	M	F	1	M	F	2	M	F	7	M	F	2	M	F	1
Assault—Secret.....	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1
Drunk—drunk and disorderly.....	6	M	F	3	M	F	5	M	F	5	M	F	8	M	F	8	M	F	3	M	F	1
Possession—illegal whiskey.....	2	M	F	1	M	F	1	M	F	1	M	F	3	M	F	4	M	F	1	M	F	1
Possession for sale—sale.....	3	M	F	6	M	F	4	M	F	2	M	F	4	M	F	1	M	F	1	M	F	1
Manufacturing—possession of material for.....	2	M	F	3	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1
Transportation.....	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	3	M	F	1	M	F	1
Violation liquor laws.....	5	M	F	3	M	F	5	M	F	1	M	F	15	M	F	1	M	F	4	M	F	2
Driving drunk.....	3	M	F	5	M	F	1	M	F	1	M	F	8	M	F	7	M	F	6	M	F	3
Reckless driving.....	1	M	F	1	M	F	1	M	F	1	M	F	3	M	F	1	M	F	2	M	F	1
Hit and run.....	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1
Speeding.....	1	M	F	1	M	F	1	M	F	1	M	F	2	M	F	2	M	F	2	M	F	1
Auto license Violations.....	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1	M	F	1
Violation Motor Vehicle laws.....	2	M	F	6	M	F	2	M	F	2	M	F	5	M	F	13	M	F	3	M	F	3
Breaking and entering.....	7	M	F	15	M	F	2	M	F	13	M	F	10	M	F	38	M	F	1	M	F	5
Larceny and receiving.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	1	M	F	1
Housebreaking.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	1	M	F	1
Housebreaking and larceny.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	1	M	F	1
Housebreaking and receiving.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	1	M	F	1
Storebreaking.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	2	M	F	2
Storebreaking and larceny.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	2	M	F	2
Storebreaking and receiving.....	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	3	M	F	2	M	F	2
Larceny.....	6	M	F	11	M	F	1	M	F	8	M	F	1	M	F	22	M	F	2	M	F	1
Larceny and receiving.....	1	M	F	4	M	F	1	M	F	3	M	F	14	M	F	5	M	F	2	M	F	3
Larceny from the person.....	1	M	F	3	M	F	1	M	F	1	M	F	1	M	F	4	M	F	1	M	F	2

[illegible]

SIXTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947														
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS									
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified									
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F					
Official misconduct.....	1																								
Perjury.....					2	2																			
Prostitution.....	1																								
Rape.....																									
Receiving stolen goods.....																									
Removing crop.....	1																								
Resisting officer.....	2				2																				
Robbery.....	2	2																							
Seduction.....																									
Slander.....																									
Trespass.....					1	1																			
Vagrancy.....																									
Worthless check.....					1																				
False pretense.....	1				5	1																			
Carnal knowledge, etc.....						2																			
Crime against nature.....		3				2																			
Slot machine laws.....																									
Kidnaping.....																									
Revenue act violations.....					3																				
Miscellaneous.....	3																								
Totals.....	86	5	124	11	4	61	4	59	4	1	13		100	17	211	14	1	4	68	4	67	6	2	2	15
Convictions.....280																									
Nolle pros.....95																									
Acquittals.....60																									
Other dispositions.....9																									
Convictions.....407																									
Nolle pros.....95																									
Acquittals.....60																									
Other dispositions.....9																									
372																									
571																									

Convictions.....230
Nolle pros.....99
Acquittals.....41
Other dispositions.....2

Convictions.....407
Nolle pros.....95
Acquittals.....60
Other dispositions.....9

372

571

SEVENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

[illegible]

[illegible]

SEVENTH JUDICIAL DISTRICT—(Continued)
IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946													JANUARY 1, 1947—DECEMBER 31, 1947												
Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS						
	White		Negro		Indian	Unclas-sified	White		Negro		Indian	Unclas-sified	White		Negro		Indian	Unclas-sified	White		Negro		Indian	Unclas-sified	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	
Nuisance.....	5																								
Official misconduct.....																									
Perjury.....																									
Prostitution.....						1	1				3														
Rape.....				2																					
Receiving stolen goods.....				3																					
Removing crop.....																									
Resisting officer.....	2																								
Robbery.....	1			3							4														
Seduction.....							1																		
Slander.....																									
Trespass.....																									
Vagrancy.....	1							1																	
Worthless check.....	1							1																	
False pretense.....	2																								
Carnal knowledge, etc.....																									
Crime against nature.....																									
Slot machine laws.....																									
Kidnaping.....																									
Revenue act violations.....																									
Miscellaneous.....	21			19	4		2		2		3														
Totals.....	103	3	252	10			23	1	27	2	40	4													

EIGHTH JUDICIAL DISTRICT

EIGHTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS										CONVICTIONS										OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
	White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
	M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F	

[illegible]

EIGHTH JUDICIAL DISTRICT—(Continued)
IN SUPERIOR COURT

Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White			Negro			Indian			Unclas- sified			White			Negro			Indian			Unclas- sified		
	M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F	
Nuisance.....	1	1											1											
Official misconduct.....																								
Perjury.....													3											
Prostitution.....	1	1																						
Rape.....																								
Receiving stolen goods.....	1	1	5	2						1			10	10		1			1			1		
Removing crop.....										1														
Resisting officer.....	4	3								1														
Robbery.....	12	2	14							2	1	3										2		
Seduction.....										6	1	4										1		
Slander.....																								
Trespass.....			1							2														
Vagrancy.....																								
Worthless check.....	4									19														
False pretense.....	6	1								2												3		
Carnal knowledge, etc.....													2									4		
Crime against nature.....										2	1											4		
Slot machine laws.....																								
Kidnaping.....																								
Revenue act violations.....																								
Miscellaneous.....	2	1	4	1						12	2	3				6						4	1	3
Totals.....	233	19	188	30			7			141	11	73	10			226	13	185	11	1		10	119	10

Convictions.....527
Nolle pros.....159
Acquittals.....77
Other dispositions.....12

775

Convictions.....446
Nolle pros.....114
Acquittals.....84
Other dispositions.....8

652

NINTH JUDICIAL DISTRICT

NINTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
Assault.....	3	7	4		2			2	2	1	1		4	1	2	1	3			
Assault and Battery.....		2							1											
Assault with deadly weapon.....	5	20	7			3	3	2	1				5	4			3	1	1	
Assault on female.....	3	1			1		2		5				2	1						
Assault with intent to kill.....	7	10	1	10	1				6	3	1	13	4	1			6			
Assault with intent to rape.....	1	1	1				1		1				1	1			1			
Assault—Secret.....		2														1				
Drunk—drunk and disorderly.....	1	4	1		1				5								2			
Possession—illegal whiskey.....			1	1		3			4	1	1							3		
Possession for sale—sale.....									1											
Manufacturing— possession of material for.....			2		2				1				1		1					
Transportation.....	1				1				2				2							
Violation liquor laws.....	3	2			1	1			2	1	3	1					2	5	2	1
Driving drunk.....	9	2	1		3				10	3			4						1	
Reckless driving.....		1			1	4			5	1			1	1				1		
Hit and run.....	2	1	2		1	1			2				2							
Speeding.....									1				1							
Auto license violations.....	1																			
Violation Motor Vehicle laws.....	4		3						6								1		3	
Breaking and entering.....	11	11	4		1	1		1	14	12	1		6	4			1		1	
Breaking and entering..... and larceny.....	12	27	11	1	4	2			21	28	1		2	20	1		2	1		
and receiving.....																			1	
Housebreaking.....																				
Housebreaking..... and larceny.....																				
and receiving.....																				
Storebreaking.....																				
Storebreaking..... and larceny.....																				
and receiving.....																				
Larceny.....	22	28	4	1	5	1	2	1	7	34	1	4		9	2	8	1			3
Larceny and receiving.....	4	3	6	1	1	1	1		3				1				1		1	
Larceny from the person.....	2	1	1		3				2								3			

NINTH JUDICIAL DISTRICT—(Continued)
IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946						JANUARY 1, 1947—DECEMBER 31, 1947						
	CONVICTIONS			OTHER DISPOSITIONS			CONVICTIONS			OTHER DISPOSITIONS			
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	
Official misconduct.....													
Perjury.....													
Prostitution.....													
Rape.....													
Receiving stolen goods.....													
Removing crop.....													
Resisting officer.....													
Robbery.....													
Seduction.....													
Slander.....													
Trespass.....													
Vagrancy.....													
Worthless check.....													
False pretense.....													
Carnal knowledge, etc.....													
Crime against nature.....													
Slot machine laws.....													
Kidnaping.....													
Revenue act violations.....													
Miscellaneous.....													
Totals.....	164	6 100	5 72	1 4	0 50	2 31	2 19	2 10	0 228	14 212	18 55	1 1	87 7 68 6 36 2 17 1

Convictions.....	442	529
Nolle pros.....	70	104
Acquittals.....	36	98
Other dispositions.....	10	22
	558	753

TENTH JUDICIAL DISTRICT

**TENTH JUDICIAL DISTRICT
IN SUPERIOR COURT**

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS						
	White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	4														7	6						
Assault and Battery.....	1						1			2					5	3						
Assault with deadly weapon.....	36	1	47	3	1		14	1	24	1		1		20	25	5		6		1		
Assault on female.....	3	1					2		3					6	5			1		1		
Assault with intent to kill.....	3	1					2			1				5	3			1		2		
Assault with intent to rape.....	2									1				2	1							
Assault—Secret.....																						
Drunk—drunk and disorderly.....	16			1			2	1	1	1				57	1	2	1	3		1		
Possession—illegal whiskey.....	6	1	9	2			4		1	1				4	7	1				1		
Possession for sale—sale.....	8		1	1			1		1	2					2				1	1	1	
Manufacturing— possession of material for Transportation.....	4	1						2	2					1						1		
Violation liquor laws.....				1						1				1								
Driving drunk.....	30		14				11		2					14	1	13			3	11	1	2
Reckless driving.....	18		12				6	4						7	2				1	3	2	
Hit and run.....	1		2				1		1					4	4				2	2	1	
Speeding.....	3	1												4	3			3	1			
Auto license violations.....															1				1			
Violation Motor Vehicle laws.....		2					1	1	1					2	1				2			
Breaking and entering.....	7	6					15	2		2				9	1	4	1		1			
and larceny.....	3	6					1	5		5				6	13				1			
and receiving.....	2									2					1							
Housebreaking.....		2																				
and larceny.....	1	9					2	3		3				2	5			1				
and receiving.....															1							
Storebreaking.....																						
and larceny.....	2	43							1					7	19				4			
and receiving.....	29	3					10							7	18					1		
Larceny.....	25	1	55	1			11	2	13	3				14	26	4			3	6		
Larceny and receiving.....	1																					
Larceny from the person.....	1	2							1					1								

[illegible]

TENTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																				
Offense	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS														
	White		Negro		Indian	Unclas-sified		White		Negro	Indian		Unclas-sified		White		Negro	Indian		Unclas-sified										
	M	F	M	F		M	F	M	F		M	F	M	F	M	F		M	F		M	F	M	F						
Nuisance.....	2	1						1							3	2	1													
Official misconduct.....																														
Perjury.....	1															2														
Prostitution.....		1						2									1	2												
Rape.....								1									2													
Receiving stolen goods.....	1	4													6		6													
Removing crop.....																														
Resisting officer.....	3	1	1					1							1		1													
Robbery.....	7	7						2	1	3				1	6		7	2												
Seduction.....																														
Slander.....																														
Trespass.....	1	1						1							2		1													
Vagrancy.....	1	1												2																
Worthless check.....															24															
False pretense.....		2						4							2	1														
Carnal knowledge, etc.....	1	1																												
Crime against nature.....								3																						
Slot machine laws.....								1									4													
Kidnaping.....																														
Revenue act violations.....																														
Miscellaneous.....	4	8						7	1	3	2				3	1	4													
Totals.....	293	7 313	13	0	0	1	0	125	9	95	13	0	0	4	0	291	25	232	18	0	0	29	1	78	2	51	7	0	0	0
										Convictions..... 627										Convictions..... 596										
										Nolle pros..... 177										Nolle pros..... 76										
										Acquittals..... 58										Acquittals..... 57										
										Other dispositions..... 11										Other dispositions..... 5										
										873										734										

Convictions.....	627	596
Nolle pros.....	177	76
Acquittals.....	58	57
Other dispositions.....	11	5
	873	734

ELEVENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947										
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS					
	White		Negro		Indian	Unclas- sified	White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified
Assault.....	8					1						5	1				5				
Assault and Battery.....																					
Assault with deadly weapon.....	6		13	6		1						8	11	4			3		2	2	
Assault on female.....	3											2							1		
Assault with intent to kill.....			6			1						2	6	1					4		
Assault with intent to rape.....			4			1						1									
Assault—Secret.....																					
Drunk—drunk and disorderly.....	7	1										1									1
Possession—illegal whiskey.....	14											1	2								
Possession for sale—sale.....																					
Manufacturing— possession of material for Transportation.....	1											1									
Violation liquor laws.....	17	1	1	6		1						13	1	3	1		4				
Driving drunk.....	26		3			3						22		4			6	1	2		
Reckless driving.....	17		6			1						25	1	9			7	1	5		4
Hit and run.....	5		2									5		4							
Speeding.....	2	1	1									7	1	1			4		1		
Auto license violations.....	2	1				1						1		4			1	1			
Violation Motor Vehicle laws.....			3														1	1			
Breaking and entering and larceny.....	1											3									
Housebreaking.....	2		3									4		3	1						
Housebreaking and larceny.....	7		20	2		1	1					12	16	5					3		
Storebreaking.....	4		1									9		6							
Storebreaking and larceny.....	33		16			2						31	29						2		
Larceny.....	40	2	33	3		7	2					27	25	2			4		1	3	
Larceny and receiving.....												2		4							
Larceny from the person.....	2		1			1						5	10				2			1	

[illegible]

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																				
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS															
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified															
Nuisance	M	F																													
Official misconduct																															
Perjury	1	1																													
Prostitution																															
Rape	1																														
Receiving stolen goods	3	7																													
Removing crop																															
Resisting officer	3	1	1																												
Robbery	5	1	7																												
Seduction	1																														
Slander	1																														
Trespass																															
Vagrancy		1																													
Worthless check	5																														
False pretense	3																														
Carnal knowledge, etc.																															
Crime against nature	2																														
Shot machine laws																															
Kidnaping																															
Revenue act violations																															
Miscellaneous	9	2	3																												
Totals	323	14	102	27	0	0	0	0	0	26	0	12	1	0	0	0	310	9	191	20	0	0	0	60	6	33	6	0	0	6	0

Convictions	536
Nolle pros	16
Acquittals	19
Other dispositions	4
	575
Convictions	530
Nolle pros	38
Acquittals	52
Other dispositions	26
	646

Convictions.....	530
Nolle pros.....	16
Acquittals.....	19
Other dispositions.....	4
	<hr/> 575

TWELFTH JUDICIAL DISTRICT

IN REPLY TO ORDER
OF THE JUDICIAL DISTRICT

TWELFTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS										CONVICTIONS										OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
	White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
	M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F			M			

[illegible]

TWELFTH JUDICIAL DISTRICT—(Continued)
IN SUPERIOR COURT

[illegible]

THIRTEENTH JUDICIAL DISTRICT

THIRTEENTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										CONVICTIONS										OTHER DISPOSITIONS																						
	White					Negro					Indian					Undas-sified					White					Negro					Indian					Undas-sified							
	M		F			M		F			M		F			M		F			M		F			M		F			M		F			M		F					
	M	F	M	F		M	F	M	F		M	F	M	F		M	F	M	F		M	F	M	F		M	F	M	F		M	F	M	F		M	F	M	F				
Assault.....	5		5			5	1	2	1							4					2					1																	
Assault and Battery.....																1																											
Assault with deadly weapon.....	4		10	1			1	2	2							8					15					1																	
Assault on female.....			5													2					6																						
Assault with intent to kill.....	2						4									5					7																						
Assault with intent to rape.....							3	1								1					2																						
Assault—Secret.....																																											
Drunk—drunk and disorderly.....	17															7					3					1																	
Possession—illegal whiskey.....																																											
Possession for sale—sale.....	2																																										
Manufacturing—																																											
possession of material for																																											
Transportation.....																																											
Violation liquor laws.....	5		2	1			1	1								7					2																						
Driving drunk.....	9	1	3				3									12					4																						
Reckless driving.....	3						2	1								11					2																						
Hit and run.....																																											
Speeding.....																																											
Auto license violations.....	2		3																																								
Violation Motor Vehicle laws.....	3																																										
Breaking and entering.....	12	1	11				1	2								13					8					1																	
and larceny.....	18		10													24					19																						
and receiving.....	13															17					5																						
Housebreaking.....																																											
and larceny.....																																											
and receiving.....																																											
Storebreaking.....																																											
and larceny.....																																											
and receiving.....																																											
Larceny.....	10		8													18					20					1																	
Larceny and receiving.....	3															2					6																						
Larceny from the person.....	2		1													1					1																						

THIRTEENTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																													
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS																								
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified																				
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F																				
Official misconduct.....																																								
Perjury.....																																								
Prostitution.....																																								
Rape.....		3	1		2	1		1					1	1																										
Receiving stolen goods.....		2											1	2	1																									
Removing crop.....																																								
Resisting officer.....		1	1										1																											
Robbery.....	4	9			2	1	3					6	1																											
Seduction.....												1																												
Slander.....																																								
Trespass.....	1											2																												
Vagrancy.....																																								
Worthless check.....																																								
False pretense.....												2	1																											
Carnal knowledge, etc.....	1				2	1						3	1																											
Crime against nature.....	2				1							2																												
Shot machine laws.....					1	1						1																												
Kidnaping.....																																								
Revenue act violations.....																																								
Miscellaneous.....	4	2			5	1						2	4																											
Totals.....	143	6	120	7	5	0	0	0	0	67	2	40	8	0	0	0	230	1	152	6	10	2	3	0	51	1	37	7	1	1	3	0								
																					Convictions.....281										Convictions.....404									
																					Nolle pros.....44										Nolle pros.....45									
																					Acquittals.....49										Acquittals.....48									
																					Other dispositions.....24										Other dispositions.....8									
																					398										505									

Convictions.....
Nolle pros.....
Acquittals.....
Other dispositions.....

281
44
49
24

Convictions.....
Nolle pros.....
Acquittals.....
Other dispositions.....

404
45
48
8

398

505

FOURTEENTH JUDICIAL DISTRICT

FOURTEENTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Indian		Unclas- sified				White		Negro		Indian		Unclas- sified			
	M	F	M	F	M	F	M	F			M	F	M	F	M	F	M	F		
Assault.....	11	1	4	1																
Assault and Battery.....							3	3			16	1	5							
Assault with deadly weapon.....	37	1	50	16			14	25	8		39	2	48	6			5	16	2	
Assault on female.....	15		5				12	2			12		9				5	2		
Assault with intent to kill.....	5		8	2			2	5					27	8			6	1	2	1
Assault with intent to rape.....	2		4				1	1			3		5				2			
Assault—Secret.....																				
Drunk—drunk and disorderly.....	15		2				3	2	2		32	3	1				4	1	2	3
Possession—illegal whiskey.....																				
Possession for sale—sale.....																				
Manufacturing— possession of material for.....																				
Transportation.....																				
Violation liquor laws.....	15		6	1			16	2	1		32		5	2			5	2		
Driving drunk.....	79	3	12				36	7			74		13				21	3		1
Reckless driving.....	16		4				7				14	1	2				3			5
Hit and run.....	11		1				1				8		3				2			2
Speeding.....	4		1				1				7		1							
Auto license violations.....	4		1				1				1		1				2			2
Violation Motor Vehicle laws.....	4		1				1				3		1				2	6	3	
Breaking and entering.....	15		9				4	1			13		7				1			
and larceny.....	40	2	47	2			7	9			55	2	42	1			9	3		
and receiving.....											2		2				2			1
Housebreaking.....											1									
and larceny.....											1		4							
and receiving.....	2												1							
Storebreaking.....	1		1								2									
and larceny.....	5		6								21		14				1			
and receiving.....																				
Larceny.....	72	2	48	3			17	4	18	4	46	1	45	1			9	2	11	10
Larceny and receiving.....											35		18	3			9	2	13	
Larceny from the person.....	3		6				1		1		1		2							1

FOURTEENTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS								OTHER DISPOSITIONS								CONVICTIONS								OTHER DISPOSITIONS								
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	
Nuisance.....																																	
Official misconduct.....																																	
Perjury.....	4	4	1																														
Prostitution.....	2			1						1	1							2	1														
Rape.....										5																							
Receiving stolen goods.....	6			1						1	1	2						1															
Removing crop.....																																	
Resisting officer.....	1		1							1	1							5															
Robbery.....	6	2	6							12	11							18															
Seduction.....	1									1								1															
Slander.....																																	
Trespass.....	1									1		1	1					2															
Vagrancy.....																																	
Worthless check.....	1		1							1								1															
False pretense.....	4	1								6								8															
Carnal knowledge, etc.....	1									2	3							6	1														
Crime against nature.....	7		4							1	1							10															
Slot machine laws.....																																	
Kidnaping.....																																	
Revenue act violations.....	2																																
Miscellaneous.....	4									2		1						5	1	1													
Totals.....	503	17	276	32	0	0	0	3	0	210	17	115	16	0	0	69	0	643	24	341	29												

Convictions	831	Convictions	1039
Nolle pros.	194	Nolle pros.	132
Acquittals	183	Acquittals	142
Other dispositions	50	Other dispositions	30
	1258		1343

FIFTEENTH JUDICIAL DISTRICT

**FIFTEENTH JUDICIAL DISTRICT
IN SUPERIOR COURT**

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS						
	White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	2	1	4	4	---	1	---	8	2	---	4	---	4	---	4	1	---	---	---	---	---	---
Assault and Battery.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Assault with deadly weapon.....	15	---	23	---	---	4	---	11	1	8	8	---	8	---	23	20	---	---	---	---	---	---
Assault on female.....	3	---	3	---	---	2	---	5	---	---	---	---	5	---	5	6	---	---	---	---	---	---
Assault with intent to kill.....	4	---	6	---	---	2	---	---	---	---	---	---	1	---	3	2	---	---	---	---	---	---
Assault with intent to rape.....	3	---	6	---	---	1	---	---	---	1	---	---	1	---	7	3	---	---	---	---	---	---
Assault—Secret.....	1	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Drunk—drunk and disorderly.....	17	---	2	---	---	1	---	6	1	---	---	---	---	---	15	1	5	1	---	---	---	---
Possession—illegal whiskey.....	18	2	14	1	---	4	---	5	---	---	---	---	2	---	22	3	8	1	---	---	---	---
Possession for sale—sale.....	9	---	9	4	---	1	---	2	---	1	---	---	---	---	5	---	5	1	---	---	---	---
Manufacturing— possession of material for.....	4	---	---	---	---	---	---	---	---	---	---	---	1	---	3	---	---	---	---	---	---	---
Transportation.....	10	---	1	---	---	---	---	3	---	---	---	---	---	---	7	---	---	---	---	---	---	---
Violation liquor laws.....	5	---	4	1	---	3	---	---	---	2	---	---	3	---	9	5	5	---	---	---	---	---
Driving drunk.....	119	2	17	---	---	13	---	12	---	---	---	---	4	---	100	3	19	---	---	---	---	---
Reckless driving.....	19	---	2	---	---	5	---	11	---	1	---	---	29	---	6	29	6	---	---	---	---	---
Hit and run.....	11	---	3	---	---	1	---	2	---	2	---	---	1	---	13	1	1	---	---	---	---	---
Speeding.....	2	---	---	---	---	---	---	1	---	---	---	---	---	---	16	2	2	---	---	---	---	---
Auto license violations.....	13	---	5	---	---	2	---	2	---	---	---	---	---	---	14	6	6	---	---	---	---	---
Violation Motor Vehicle laws.....	1	---	---	---	---	---	---	---	---	1	---	---	---	---	---	---	---	---	---	---	---	---
Breaking and entering.....	6	---	11	---	---	1	---	5	---	2	1	---	1	---	14	5	1	---	---	---	---	---
and larceny.....	7	---	8	---	---	---	---	9	---	1	---	---	---	---	29	6	6	---	---	---	---	---
and receiving.....	5	---	1	---	---	---	---	---	---	2	---	---	3	---	15	3	---	---	---	---	---	---
Housebreaking.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
and larceny.....	2	---	---	---	---	---	---	---	---	---	---	---	---	---	2	---	---	---	---	---	---	---
and receiving.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Storebreaking.....	1	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
and larceny.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
and receiving.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Larceny.....	20	4	14	8	---	1	---	8	---	5	---	---	2	---	20	1	11	2	---	---	---	---
Larceny and receiving.....	13	---	10	---	---	4	---	1	6	4	9	3	6	---	26	1	8	1	---	---	---	---
Larceny from the person.....	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---

FIFTEENTH JUDICIAL DISTRICT—(Continued)
IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946																	JANUARY 1, 1947—DECEMBER 31, 1947																																																		
CONVICTIONS										OTHER DISPOSITIONS							CONVICTIONS							OTHER DISPOSITIONS																																											
White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified																																					
M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F																																				
Nuisance.....																																		1																																	
Official misconduct.....																																																																			
Perjury.....																																		1	1	2																															
Prostitution.....																																		2	1																																
Rape.....																																		1																																	
Receiving stolen goods.....																																		1	1	1																															
Removing crop.....																																		1	2																																
Resisting officer.....																																		3	1	3	1	2																													
Robbery.....																																		10	1	2	1	5	7	5	1	3																									
Seduction.....																																		1																																	
Slander.....																																																																			
Trespass.....																																																																			
Vagrancy.....																																		1		7	1	2																													
Worthless check.....																																																																			
False pretense.....																																				1																															
Carnal knowledge, etc.....																																				1	4	2																													
Crime against nature.....																																		3																																	
Slot machine laws.....																																		1	1	1																															
Kidnaping.....																																				1																															
Revenue act violations.....																																																																			
Miscellaneous.....																																		4	4	6	1	3	1	1	4	1	5	1	5	2	5	1	1																		
Totals.....																																		389	14	191	29	57	1	174	16	53	15	61	5	568	18	107	19	61	1	123	10	21	5												
																																		Convictions.....																	864																
																																		Nolle pros.....																	240																
																																		Acquittals.....																	28																
																																		Other dispositions.....																	19																
																																		1005																	1161																

SIXTEENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Indian	Unclas- sified		White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified			
M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	
Assault.....	14	1	1	1	1	3	1	F	M	F	M	1	3	F	M	2	1	1		
Assault and Battery.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
Assault with deadly weapon.....	18	4	12	1	2	7	5	1	1	1	1	1	41	22	1	22	1	5		
Assault on female.....	10	2	2	2	2	3	3	1	1	1	1	1	23	4	2	4	2	2	2	
Assault with intent to kill.....	12	5	5	5	2	2	13	1	1	1	1	1	23	1	1	1	1	1	1	
Assault with intent to rape.....	5	2	1	1	1	1	1	1	1	1	1	1	7	1	1	2	1			
Assault—Secret.....	1	1	1	1	1	1	1	1	1	1	1	1	29	6	2	5	2			
Drunk—drunk and disorderly.....	23	1	2	7	2	2	1	1	1	1	1	1	1	1	1	1	1			
Possession—illegal whiskey.....	2	2	2	2	2	2	2	2	2	2	2	2	1	1	1	1	1			
Possession for sale—sale.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
Manufacturing—possession of material for Transportation.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
Violation liquor laws.....	75	4	17	4	1	7	3	2	1	1	1	1	41	4	5	1	8	1		
Driving drunk.....	129	4	4	1	5	5	5	1	1	1	1	1	125	8	1	11	1			
Reckless driving.....	25	2	1	1	11	11	1	1	1	1	1	1	43	1	1	7	1			
Hit and run.....	4	3	3	3	4	2	2	1	1	1	1	1	14	1	1	1	1			
Speeding.....	53	2	1	1	2	2	1	1	1	1	1	1	99	2	3	5	1			
Auto license violations.....	40	1	2	1	1	1	1	1	1	1	1	1	90	1	5	2	2			
Violation Motor Vehicle laws.....	1	1	1	1	1	1	1	1	1	1	1	1	2	2	1	1	1			
Breaking and entering.....	17	9	4	2	1	2	1	1	1	1	1	1	15	6	1	4	1			
and larceny.....	16	1	4	2	2	4	1	1	1	1	1	1	39	1	2	3	1			
and receiving.....	14	1	1	1	1	1	1	1	1	1	1	1	6	5	6	1	1			
Housebreaking.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
and larceny.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
and receiving.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
Storebreaking.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
and larceny.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
and receiving.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1			
Larceny.....	27	2	12	1	3	4	2	4	1	1	2	2	25	8	1	10	4			
Larceny and receiving.....	3	1	1	1	2	2	2	2	1	1	1	1	7	1	1	7	1			
Larceny from the person.....	6	7	2	2	2	2	2	2	2	2	2	2	3	4	1	1	1			

SIXTEENTH JUDICIAL DISTRICT--(Continued)
IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946														JANUARY 1, 1947—DECEMBER 31, 1947																	
CONVICTIONS								OTHER DISPOSITIONS								CONVICTIONS								OTHER DISPOSITIONS							
White		Negro		Indian		Unclas-sified		White		Negro		Indian		Unclas-sified		White		Negro		Indian		Unclas-sified		White		Negro		Indian		Unclas-sified	
M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Offense																															
Nuisance.....																															
Official misconduct.....																															
Perjury.....																															
Prostitution.....																															
Rape.....																															
Receiving stolen goods.....																															
Removing crop.....																															
Resisting officer.....																															
Robbery.....																															
Seduction.....																															
Slander.....																															
Trespass.....																															
Vagrancy.....																															
Worthless check.....																															
False pretense.....																															
Carnal knowledge, etc.....																															
Crime against nature.....																															
Slot machine laws.....																															
Kidnaping.....																															
Revenue act violations.....																															
Miscellaneous.....																															
Totals.....																															
637 31 135 18 39 1 111 10 24 8 12 1 864 22 126 7 28 124 5 22 5 3																															
Convictions.....																Convictions.....															
Nolle pros.....																Nolle pros.....															
Acquittals.....																Acquittals.....															
Other dispositions.....																Other dispositions.....															
861																1047															
80																68															
77																86															
9																5															
1027																1205															

SEVENTEENTH JUDICIAL DISTRICT

SEVENTEENTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										CONVICTIONS										OTHER DISPOSITIONS									
	White					Negro					Indian					White					Negro					Indian				
	M		F		Uclas-	M		F		Uclas-	M		F		Uclas-	M		F		Uclas-	M		F		Uclas-	M		F		Uclas-
	F	M	F	M	sified	F	M	F	M	sified	F	M	F	M	sified	F	M	F	M	sified	F	M	F	M	sified	F	M	F	M	sified
Assault.....	8	1	1			3										7	1	2												
Assault and Battery.....																														
Assault with deadly weapon.....	15	2	7			4	1				23	1	8	3											3	1	1			
Assault on female.....	3		1			1						5	3																	
Assault with intent to kill.....	2											1																		
Assault with intent to rape.....	1					1						1																		
Assault—Secret.....																														
Drunk—drunk and disorderly.....	15	2	1			8						15		1											2					
Possession—illegal whiskey.....	4		2								4																			
Possession for sale—sale.....	1										4																			
Manufacturing— possession of material for.....																														
Transportation.....	5		2			1						1																		
Violation liquor laws.....	41	3	4	2		6		2			4														10	3				
Driving drunk.....	120		1		1	6					149	2	10												11	1				
Reckless driving.....	36		3			2					68		3	1											10					
Hit and run.....	3					1						5	1												5	1				
Speeding.....												59		4																
Auto license violations.....												30		5																
Violation Motor Vehicle laws.....	41	1	17			14	2				51		4												36	1	3			
Breaking and entering.....						1						6													3					
and larceny.....	7		1					1																						
and receiving.....																														
Housebreaking.....	2																													
and larceny.....																														
and receiving.....	8	2	2					2				12		2											3	2				
Storebreaking.....																														
and larceny.....																														
and receiving.....																														
Larceny.....	17		4									7														1				
Larceny and receiving.....	2	1	1					5	1			3														2	1			
Larceny from the person.....	5					1																				3		1		

[illegible]

SEVENTEENTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White		Negro		Indian	Unclas-sified	White		Negro	Indian	Unclas-sified	White		Negro	Indian	Unclas-sified	White		Negro	Indian	Unclas-sified			
	M	F	M	F	M	M	M	F	M	F	M	M	F	M	F	M	M	F	M	F	M	F		
Nuisance.....																								
Official misconduct.....																								
Perjury.....																								
Prostitution.....																								
Rape.....	1																							
Receiving stolen goods.....	2		2					2						2	2									
Removing crop.....																								
Resisting officer.....	10																							
Robbery.....								1																
Seduction.....	2																							
Slander.....																								
Trespass.....	2	1																						
Vagrancy.....	1																							
Worthless check.....																								
False pretense.....								1																
Carnal knowledge, etc.....								1																
Crime against nature.....	2																							
Slot machine laws.....	8	1	1																					
Kidnaping.....																								
Revenue act violations.....																								
Miscellaneous.....	7	1	1					3																
Totals.....	481	24	56	5		4	102	8	16	1	1	659	22	82	7		7	2			134	10	19	4

Convictions.....570
 Nolle pros.....100
 Acquittals.....25
 Other dispositions.....3

Convictions.....770
 Nolle pros.....107
 Acquittals.....26
 Other dispositions.....34

EIGHTEENTH JUDICIAL DISTRICT

EIGHTEENTH JUDICIAL DISTRICT IN SUPERIOR COURT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	5	2	2						2	1			13	2	3		1			
Assault and Battery.....	1												2				2			
Assault with deadly weapon.....	16	5	2	9	8	2	1						20	1	6		6			
Assault on female.....	9	3		1	7	1							11	2			2			
Assault with intent to kill.....	3				4								2				1			
Assault with intent to rape.....	1				2								3	2						
Assault—Secret.....																				
Drunk—drunk and disorderly.....	49	1	1		3	3							79	7	2		4			
Possession—illegal whiskey.....	2			3									7	1	2					
Possession for sale—sale.....	1				1								6	4	1			2		
Manufacturing—																				
possession of material for.....	1			1									5	1						
Transportation.....	4	2		1	4								19	1	2		4			
Violation liquor laws.....	39	13	1		14	1	6						22	4	1		7	1	3	
Driving drunk.....	34	1	3	4	12								77	13		5	10			1
Reckless driving.....	6				4								27	6		4	9			
Hit and run.....				1									3				1			
Speeding.....				1									29	3			1	1		
Auto license violations.....		1											11							
Violation Motor Vehicle laws.....	12	3											4	4						
Breaking and entering.....	13	1	5	1	2	5							55	8			3	4		
and larceny.....													11	4			6	2		
Housebreaking.....																				
and receiving.....																				
and larceny.....																				
Storebreaking.....																				
and receiving.....																				
Larceny.....	27	3	9	6	9	4											7	2		
Larceny and receiving.....	3				1												2			
Larceny from the person.....	1				1	1									1					

[illegible]

EIGHTEENTH JUDICIAL DISTRICT—(Continued) IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS								
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified				
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F			
Nuisance.....																											
Official misconduct.....																											
Perjury.....																											
Prostitution.....		1	1																			3					
Rape.....		1																									
Receiving stolen goods.....		2	2																			1					
Removing prop.....																						6	1				
Resisting officer.....		2																				3	1	2			
Robbery.....		1									3											1					
Seduction.....											1											2					
Slander.....																						5	2				
Trespass.....		4	2																			1					
Vagrancy.....											1																
Worthless check.....		3																									
False pretense.....		1									2											1					
Carnal knowledge, etc.....											1																
Crime against nature.....																											
Slot machine laws.....																											
Kidnaping.....		2																									
Revenue act violations.....																											
Miscellaneous.....		4	1								3	2											6	1			
Totals.....	332	23	61	7			36	111	7	28	3				2	615	12	106	13			10	121	10	13	6	1

Convictions.....	459
Nolle pros.....	756
Acquittals.....	108
Other dispositions.....	35
	8
	610
	907

NINETEENTH JUDICIAL DISTRICT

NINETEENTH JUDICIAL DISTRICT IN SUPERIOR COURT

JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947												
Offense	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White		Negro		Indian		Unclas- sified	White		Negro		Indian		Unclas- sified	White		Negro		Indian		Unclas- sified			
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F		
Assault.....	5	1		1				3	1						6									
Assault and Battery.....																								
Assault with deadly weapon.....	20		10	2				7	1	2	4				32	2	10	3		11	1	2	1	
Assault on female.....	6		2					3		1					9					9		2		
Assault with intent to kill.....	2		1					4		2					6		2			3				
Assault with intent to rape.....	1		1					1		3					5									
Assault—Secret.....																								
Drunk—drunk and disorderly.....	62	7	3					20	2	1					68	6	1			17	7			
Possession—illegal whiskey.....	3														3					1				
Possession for sale—sale.....																								
Manufacturing.....																								
possession of material for.....																								
Transportation.....	16														2									
Violation liquor laws.....	9		12	1				10		1					9					12	1	4	1	
Driving drunk.....	20	1	1					4							32		4			8				
Reckless driving.....	12							5	1						10					14				
Hit and run.....								1							13					5				
Speeding.....										1					1									
Auto license violations.....															3					2				
Violation Motor Vehicle laws.....	1							1																
Breaking and entering.....	2	3						2		4					1	1	4							
and larceny.....	12	1						2							5	3								
and receiving.....	4														2									
Housebreaking.....																								
and larceny.....	14	18						3		1					35		29			2				
and receiving.....	1														1					6	2	2		
Storebreaking.....																								
and larceny.....																								
and receiving.....																								
Larceny.....	17	2	16					15	2	2					28	1	4	3		19		2		
Larceny and receiving.....	8	3						8							18		1	1		4		3	1	
Larceny from the person.....	1																						1	

TWENTIETH JUDICIAL DISTRICT

**TWENTIETH JUDICIAL DISTRICT
IN SUPERIOR COURT**

[illegible]

[illegible]

TWENTIETH JUDICIAL DISTRICT—(Continued) **IN SUPERIOR COURT**

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Official misconduct.....																				
Perjury.....																				
Prostitution.....																				
Rape.....																				
Receiving stolen goods.....																				
Removing crop.....																				
Resisting officer.....	5				1															
Robbery.....	5																			
Seduction.....					2	1														
Slander.....																				
Trespass.....	2																			
Vagrancy.....																				
Worthless check.....																				
False pretense.....			1		3	1	1													
Carnal knowledge, etc.....																				
Crime against nature.....																				
Slot machine laws.....						1														
Kidnaping.....																				
Revenue act violations.....																				
Miscellaneous.....	5	1			2												7	1		
Totals.....	486	25	11	1	24	2	4		270	19	9	2	1				259	13	7	

Convictions.....	553	771
Nolle pros.....	270	275
Acquittals.....	13	13
Other dispositions.....	18	8
	\$54	1067

TWENTY-FIRST JUDICIAL DISTRICT

**TWENTY-FIRST JUDICIAL DISTRICT
IN SUPERIOR COURT**

[illegible]

[illegible]

TWENTY-FIRST JUDICIAL DISTRICT—(Continued) **IN SUPERIOR COURT**

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS										CONVICTIONS										OTHER DISPOSITIONS									
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified									
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F								
Nuisance.....																																								
Official misconduct.....																																								
Perjury.....																																								
Prostitution.....	1	1																																						
Rape.....																																								
Receiving stolen goods.....																																								
Removing crop.....	1																																							
Resisting officer.....	7		3																																					
Robbery.....	7		1						6																															
Seduction.....																																								
Slander.....																																								
Trespass.....	3	1	1																																					
Vagrancy.....	1	1							1																															
Worthless check.....	1																																							
False pretense.....																																								
Carnal knowledge, etc.....																																								
Crime against nature.....									1																															
Slot machine laws.....	2																																							
Kidnaping.....																																								
Revenue act violations.....																																								
Miscellaneous.....	9	1							1	2																														
Totals.....	444	8	111	15				1		44	8	11	1				11	1	437	11	126	17											13							

Convictions.....	579
Nolle pros.....	38
Acquittals.....	35
Other dispositions.....	3
	655

Convictions.....	597
Nolle pros.....	114
Acquittals.....	35
Other dispositions.....	16
	762

ALPHABETICAL LIST OF CRIMES IN SUPERIOR COURTS

	1946		1947	
	Convictions	Other Dispositions	Convictions	Other Dispositions
Assault.....	273	112	267	125
Assault and battery.....	15	7	23	11
Assault with deadly weapon.....	844	307	942	254
Assault on female.....	198	81	240	77
Assault with intent to kill.....	209	65	255	113
Assault with intent to rape.....	70	40	100	27
Assault—secret.....	17	4	15	12
Drunk—drunk and disorderly.....	441	104	565	107
Possession—illegal whiskey.....	131	24	132	28
Possession for sale—sale.....	90	21	82	33
Manufacturing—possession of material for.....	35	7	35	7
Transportation.....	74	24	80	15
Violation liquor laws.....	482	160	429	136
Driving drunk.....	1098	268	1365	325
Reckless driving.....	345	122	492	206
Hit and run.....	89	32	118	51
Speeding.....	91	16	283	15
Auto license violations.....	111	14	272	52
Violation motor vehicle laws.....	139	43	114	61
Breaking and entering.....	326	83	384	76
and larceny.....	410	162	536	119
and receiving.....	202	50	228	29
Housebreaking.....	25	2	18	8
and larceny.....	137	23	146	20
and receiving.....	56	14	61	10
Storebreaking.....	7	1	23	2
and larceny.....	58	1	64	7
and receiving.....	101	16	107	10
Larceny.....	931	293	855	261
Larceny and receiving.....	270	99	337	130
Larceny from the person.....	103	35	77	46
Larceny by trick and device.....	5	3	6	0

	1946		1947	
	Convictions	Other Dispositions	Convictions	Other Dispositions
Larceny of automobile.....	224	39	221	47
Temporary larceny.....	39	5	30	3
Murder—first degree.....	71	65	83	62
Murder—second degree.....	160	11	166	17
Manslaughter.....	223	91	227	80
Burglary—first degree.....	23	16	28	7
Burglary—second degree.....	20	1	40	5
Abandonment.....	132	76	147	96
Abduction.....	2	8	5	6
Affray.....	65	27	62	12
Arson.....	14	18	32	8
Bigamy.....	65	36	50	20
Bribery.....	2	3	1	1
Burning other than arson.....	0	0	0	1
Carrying concealed weapon.....	139	44	165	51
Contempt.....	2	0	4	0
Conspiracy.....	19	19	54	18
Cruelty to animals.....	7	10	7	7
Disorderly conduct.....	61	34	43	20
Disorderly house.....	9	6	13	5
Disposing of mortgaged property.....	9	8	12	10
Disturbing religious worship.....	3	2	2	7
Violation of election laws.....	0	0	0	0
Embezzlement.....	72	38	60	43
Escape.....	34	4	28	7
Failure to list tax.....	0	0	0	0
Food and drug laws.....	0	0	0	0
Fish and game laws.....	28	12	43	22
Forcible trespass.....	160	20	230	21
Forgery.....	315	56	458	43

ALPHABETICAL LIST OF CRIMES IN SUPERIOR COURTS

	1946		1947	
	Convictions	Other Dispositions	Convictions	Other Dispositions
Fornication and adultery.....	68	56	78	41
Gaming and lottery laws.....	96	19	136	22
Health laws.....	2	1	3	1
Incest.....	7	8	8	4
Injury to property.....	51	16	70	25
Municipal ordinances.....	17	18	32	25
Nonsupport.....	205	106	304	113
Nonsupport of illegitimate child.....	65	29	89	26
Nuisance.....	16	27	23	18
Official misconduct.....	0	0	0	0
Perjury.....	24	16	27	23
Prostitution.....	28	17	27	13
Rape.....	21	51	40	33
Receiving stolen goods.....	81	17	130	33
Removing crop.....	0	4	0	2
Resisting officer.....	83	38	95	16
Robbery.....	202	93	258	101
Seduction.....	14	16	18	11
Slander.....	1	1	1	5
Trespass.....	47	33	52	49
Vagrancy.....	15	12	31	8
Worthless check.....	47	36	125	30
False pretense.....	104	71	105	75
Carnal knowledge, etc.....	23	28	27	22
Crime against nature.....	38	15	50	10
Slot machine laws.....	11	1	36	1
Kidnaping.....	9	9	6	25
Revenue act violations.....	2	0	0	0
Miscellaneous.....	220	129	232	191
Totals.....	10,727	3,689	12,814	3,915

FIRST JUDICIAL DISTRICT

**FIRST JUDICIAL DISTRICT
INFERIOR COURTS**

[illegible]

[illegible]

FIRST JUDICIAL DISTRICT—(Continued) INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																								
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS																			
	White		Negro		Indian	Unclas- sified		White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified																		
	M	F	M	F	M	M	F	M	F	M	F	M	M	F	M	F	M	F																	
Nuisance.....	2		3										4		2	1																			
Official misconduct.....																																			
Perjury.....																																			
Prostitution.....	3	3	8	8					2				1	1	2	3																			
Rape.....																																			
Receiving stolen goods.....			1							2			3		3																				
Removing crop.....													1		1																				
Resisting officer.....	13		3	1					1				4		3																				
Robbery.....	1								2	1					2																				
Seduction.....																																			
Slander.....																																			
Trespass.....	9		9	3									1																						
Vagrancy.....									1				12	1	15																				
Worthless check.....	19	1	9	1									2	4	2																				
False pretense.....									4	1			31		7	1																			
Carnal knowledge, etc.....	1		13							2			3		16																				
Crime against nature.....													1																						
Slot machine laws.....																																			
Kidnaping.....																																			
Revenue act violations.....																																			
Miscellaneous.....	83	10	89	10			4		16		17	1																							
Totals.....	1415	75	1226	82			68		117	4	139	19			1		2537	166	1780	130			100	3	216	1	204	22					1		2

Convictions.....	2866	4716
Bound Over.....	58	115
Other Dispositions.....	222	340
	3146	5171

SECOND JUDICIAL DISTRICT

**SECOND JUDICIAL DISTRICT
INFERIOR COURTS**

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified		
	M	F	M	F			M	F	M	F			M	F	M	F			M	F
Assault.....	44	3	141	14																
Assault and battery.....																				
Assault with deadly weapon.....	41	1	153	25																
Assault on female.....	21		84																	
Assault with intent to kill.....	2		4																	
Assault with intent to rape.....																				
Assault—secret.....	1																			
Drunk—drunk and disorderly.....	640	27	505	54																
Possession—illegal whiskey.....	24	1	22	5																
Possession for sale—sale.....	14	2	18																	
Manufacturing—																				
possession of material for	8		8																	
Transportation.....	2		1																	
Violation liquor laws.....	37	2	96	13																
Driving drunk.....	170	4	81																	
Reckless driving.....	118		80	3																
Hit and run.....	12		11																	
Speeding.....	339	10	79																	
Auto license violations.....	123	10	142	8																
Violation motor vehicle laws.....	186	2	182	2																
Breaking and entering			2																	
and larceny.....			2																	
and receiving.....																				
Housebreaking.....																				
and larceny.....			1																	
and receiving.....																				
Storebreaking.....																				
and larceny.....																				
and receiving.....																				
Larceny.....	19	1	43	7																
Larceny and receiving.....	1		17	3																
Larceny from the person.....																				

Temporary larceny.....	1	6				1	1			2	3			1	1
Murder—first degree.....						6	1							6	2
Murder—second degree.....						1	1								
Manslaughter.....						7	4	1						6	4
Burglary—first degree.....							3								
Burglary—second degree.....															2
Abandonment.....	10	11	1			7	3	10	1	12	12			7	6
Abduction.....						1								1	
Affray.....	26	1	43	16		8		10	3	21	1	45	23	5	13
Arson.....						2								7	
Bigamy.....						1									
Bribery.....						4	1								
Burning other than arson.....															
Carrying concealed weapon.....	10	47	2			4		6		7	44			2	1
Contempt.....															5
Conspiracy.....		1													
Cruelty to animals.....	1	1	1			1	1			1	6				1
Cruelty to animals.....															
Disorderly conduct.....	35	6	54	32		6	2	14	4	13	3	32	15	6	1
Disorderly house.....	1	1	2	2		1			1						8
Disposing of mortgaged property.....						1		1			2			1	1
Disturbing religious worship.....								3			1				3
Disturbing religious worship.....															
Violation of election laws.....															
Embezzlement.....						1		1							2
Escape.....		1	1			1		1			2				
Failure to list tax.....															
Food and drug laws.....															
Fish and game laws.....	2	5								13	6				
Foreable trespass.....	3	3								4	6			3	1
Forgery.....	1					1	1	6						6	22
Fornication and adultery.....	3	3	7	5		2	1	4	1	1	2	1	6	2	1
Gaming and lottery laws.....	35	65	1			10				12	89	2		7	3
Health laws.....		14	1					3		2	1	18	13	1	1
Incest.....															
Injury to property.....	9	1	13	4		2	1	7	1	15	10			2	3
Injury to property.....															2
Municipal ordinances.....	17	9			1	16	2	22		21	1	10	1	7	1
Nonsupport.....	37					46				32	46			14	23
Nonsupport of illegitimate child.....	6	31				1				10	42			4	5

THIRD JUDICIAL DISTRICT

THIRD JUDICIAL DISTRICT INFERIOR COURTS

[illegible]

Larceny of automobile.....	7	3	1	2	5	0		
Temporary larceny.....	11	1	1	6	1	3		
Murder—first degree.....		3	2					
Murder—second degree.....		1	3					
Manslaughter.....		6	5					
Burglary—first degree.....	13	3	3	4	1			
Burglary—second degree.....		3	3	4	1			
Alfordment.....	51	13						2
Adultery.....	6							
Arson.....								
Bigamy.....								
Perjury.....								
Burning other than arson.....	62	1	5					
Carrying concealed weapon.....		1						
Contempt.....	1							
Conspiracy.....								
Cruelty to animals.....	2	7	1					
Disorderly conduct.....	39	2	3	4	7	2		
Disorderly house.....	1		1					
Disposing of mortgaged property.....								
Disturbing religious worship.....	2							
Violation of election laws.....								
Embezzlement.....								
Escape.....	1							
Failure to list tax.....								
Food and drug laws.....								
Fish and game laws.....	11							
Forcible trespass.....	10	12	1					
Forgery.....								
Fornication and adultery.....	6	7	7					
Gaming and lottery laws.....	22	49	1					
Health laws.....		1						
Invest.....								
Injury to property.....	26	34	2	10	2	11		
Municipal ordinances.....	12	3	16	1				
Nonsupport.....	28	41	1	17	14			
Nonsupport of illegitimate child.....	1				10			

THIRD JUDICIAL DISTRICT—(Continued) INFERIOR COURTS

Case	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified			White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified		
Nuisance.....	M	F	M	F	M	F	M	F			M	F	M	F	M	F	M	F		
Official misconduct.....	3	2			1							1								
Perjury.....																				
Fraud.....	1	3	2		2	2											1			
Reception.....		6	1												1					
Receiving stolen goods.....						2	1				2	1			1	2				
Removing crop.....					2		1									3				
Resisting officer.....	7	16	1		2	2					3	11			1	1				
Rioting.....		1			1			1							4					1
Sedition.....					2															
Sluttry.....																				
Trespass.....	13	1	14	2	3	9					16	1	18	1	6	3	1			
Vagrancy.....																				
Worthless check.....	31	17																		
False pretense.....	2	4			2	1					41	21	2	1	5	1				
Caral knowledge, etc.....					1	4					2	4			1	2				
Crime against nature.....		1				1						2				6				
Slot machine laws.....												1				2				
Kidnaping.....												1								
Revenue act violations.....																				
Miscellaneous.....	27	4	58	9	9	20	2				29	50	1							
Totals.....	1406	51	2118	127	1	49	302	19	273	35	1427	38	1068	120	348	22	350	20		31

Convictions.....3755
 Bound over.....55
 Other dispositions.....683
 4493

Convictions.....3698
 Bound over.....99
 Other dispositions.....681
 4478

FOURTH JUDICIAL DISTRICT

FOURTH JUDICIAL DISTRICT INFERIOR COURTS

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

CONVICTIONS

OTHER DISPOSITIONS

CONVICTIONS

OTHER DISPOSITIONS

Offense	CONVICTIONS				OTHER DISPOSITIONS				CONVICTIONS				OTHER DISPOSITIONS			
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F	M F
Assault.....	86	6	119	15	1	2	35	1	29	5	1	2	88	2	163	19
Assault and battery.....	2															
Assault with deadly weapon.....	75	2	129	25	1		43	3	58	7			56	2	135	28
Assault on female.....	39		71			1	20		20		1		32		55	
Assault with intent to kill.....							4		7				2		2	
Assault with intent to rape.....																
Assault—secret.....																
Drunk—drunk and disorderly.....	361	13	218	26	7	1	15	3	13	1			343	6	290	22
Possession—illegal whiskey.....	90			49	5		5	1	4	1			79	2	35	4
Possession for sale—sale.....	15	2	38	10			7	1	7	4			12	3	27	5
Manufacturing— possession of material for.....	14		8						3				7		19	1
Transportation.....	26		19				4	1	2				23		29	1
Violation liquor laws.....	102	2	70	14			14	1	25	3			168	5	116	19
Driving drunk.....	465	6	179		1		1	33		16			444	5	143	
Reckless driving.....	175	3	84	2		1	45	1	31	1		3	172	2	62	
Hit and run.....	14		8				7	1					10		6	
Speeding.....	86	3	9		1		3						265	3	45	2
Auto license violations.....	176	9	100	4	2	1	6	1	5			4	242	13	153	5
Violation motor vehicle laws.....	63		43	2			4		3			1	93		51	2
Breaking and entering.....	1		4	1			1		9				4		3	
and larceny.....			4				3		2				1			
and receiving.....																
Housebreaking.....							2									
and larceny.....									2							
and receiving.....																
Storebreaking.....																
and larceny.....																
and receiving.....																
Larceny.....	40	1	107	16			26	4	28	2			26		88	26
Larceny and receiving.....				1			2		2				2		3	1

Summary of trials and convictions											
Larceny of automobile.....	2	3									
Temporary larceny.....	3	5									
Murder—first degree.....					1						
Murder—second degree.....					3						
Manslaughter.....											
Burglary—first degree.....					1						
Burglary—second degree.....											
Abandonment.....	44	1	22		20	4	8				
Abduction.....											
Affray.....	25	5	27	7	10		4	2			
Arson.....					1		1				
Bigamy.....											
Brigamy.....											
Burning other than arson.....											
Carrying concealed weapon.....	31	2	63		4		6				
Contempt.....											
Conspiracy.....											
Cruelty to animals.....	1		1		1						
Disorderly conduct.....	9	2	13	3	2	1	2				
Disorderly house.....				1							
Disposing of mortgaged property.....	3										
Disturbing religious worship.....			4				3				
Violation of election laws.....											
Embezzlement.....					2		1				
Escape.....	2		10	1							
Failure to list tax.....											
Food and drug laws.....											
Fish and game laws.....	1										
Forcible trespass.....	8	2	5		3	1					
Forgery.....					1						
Fornication and adultery.....	8	5	9	7	2	1	2	1			
Gaming and lottery laws.....	9		39	1	2		2				
Health laws.....	2			1							
Incest.....			1		1						
Injury to property.....	41	2	18	2			2	1			
Municipal ordinances.....	6				3						
Nonsupport.....	57		33		1		20	1	9		
Nonsupport of illegitimate child.....	6		8								

FOURTH JUDICIAL DISTRICT—(Continued) INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																			
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS														
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified										
Nuisance.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F										
Official misconduct.....	1				1																									
Perjury.....	8	4	15	13	1	1	3		5	6	5	6																		
Prostitution.....					2	5																								
Rape.....					4	1	1		3	2																				
Receiving stolen goods.....					1																									
Removing crop.....					1																									
Resisting officer.....	17	8	4		1	4			15	2	10		3	4																
Robbery.....					3	7		2																						
Seduction.....	1																													
Slander.....																														
Trespass.....	29	6	21	5	1				24	3	29	2	15	1	5	2														
Vagrancy.....	1				2	1																								
Worthless check.....	14	1	2		3	3	1		29		3		1	16																
False pretense.....	3	1			2	2			4	1	3		1	9	2															
Carnal knowledge, etc.....						2								1																
Crime against nature.....					1									1																
Slot machine laws.....	3								6																					
Kidnaping.....																														
Revenue act violations.....																														
Miscellaneous.....	36	5	35	8		3	1	17	1	8	3		52	3	31	3	1													
Totals.....	2201	83	1608	175	14	11	3	413	30	361	37	4	2469	72	1855	190	12	47	503	26	377	51	3	30	5					
	Convictions.....										Convictions.....										Convictions.....									
	Bound over.....										Bound over.....										Bound over.....									
	Other dispositions.....										Other dispositions.....										Other dispositions.....									
	4955										4955										4955									
	79										79										79									
	893										893										893									
	5640										5640										5640									

Convictions.....	4005	Convictions.....	4645
Bound over.....	79	Bound over.....	102
Other dispositions.....	781	Other dispositions.....	893
	4955		5640

FIFTH JUDICIAL DISTRICT

FIFTH JUDICIAL DISTRICT INFERIOR COURTS

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS										CONVICTIONS										OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								
	White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified					White					Negro					Indian					Unclas- sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																															
	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F		Total	M		F	

FIFTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																			
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS														
	White		Negro		Indian	Unclas- sified	White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified	White		Negro	Indian	Unclas- sified									
	M	F	M	F	M	M	M	F	M	F	M	F	M	F	M	F	M	M	F	M	F	M	F							
Nuisance.....	4	4	2	4							3	1	1			1		1	2											
Official misconduct.....																														
Perjury.....																														
Prostitution.....			2	3							2		1																	
Rape.....																														
Receiving stolen goods.....			2	1		1	1																							
Removing crop.....																														
Resisting officer.....	4		6								5	1	3																	
Robbery.....																														
Seduction.....																														
Slander.....																														
Trespass.....	5	1	8	2		3	1				1		6				7		1											
Vagrancy.....	1	5	1								3																			
Worthless check.....	9		3			2				1	7		12			12	6		2											
False pretense.....	1								1				5	1					2											
Carnal knowledge, etc.....											1																			
Crime against nature.....			1																											
Slot machine laws.....	3										4																			
Kidnaping.....																														
Revenue act violations.....																														
Miscellaneous.....	3	2	13	2		7	1	3	1	5		1	15	3	21	4		8		1	1									
Totals.....	507	27	749	76		232	6	70	7	55	5	33	2	684	25	774	69	1	104	141	6	63	13	4						
	Convictions.....										Convictions.....										Convictions.....									
	Bound over.....										Bound over.....										Bound over.....									
	Other dispositions.....										Other dispositions.....										Other dispositions.....									
	1769										1597										1657									
	11										11										11									
	216										216										216									
	1884										1884										1884									

Convictions.....	1597	1657
Bound over.....	1	11
Other dispositions.....	171	216
	1769	1884

SIXTH JUDICIAL DISTRICT

THOMAS J. HARRIS
JUDGE OF THE SIXTH JUDICIAL DISTRICT

SIXTH JUDICIAL DISTRICT INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																			
	White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified		White		Negro		Indian	Unclas- sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																															
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
Assault.....	26	2	30	6			2		16	1	13	5					42	1	51	10			3				15	3	17	5																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																					

SIXTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																		
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS													
	White		Negro		Indian	Unclas- sified		White		Negro	Indian	Unclas- sified		White		Negro	Indian	Unclas- sified											
	M	F	M	F	M	M	F	M	F	M	M	F	M	F	M	F	M	M	F										
Nuisance.....	1	1					6							5	1			1	2										
Official misconduct.....																													
Perjury.....																													
Prostitution.....	12	20	14	15	1	1	5	7	1	2		16	14	24	16		3	2	2	3									
Rape.....							3										1												
Receiving stolen goods.....			5				1		1	1					5					7		1							
Removing crop.....	1										1				1					1									
Resisting officer.....	5		6	2					1					5	2	2		2											
Robbery.....										2								1		6									
Seduction.....																													
Slander.....									1																				
Trespass.....	1		7	1			2		2					8	1	6	2		2	1	1		1						
Vagrancy.....	5	1	1	2	1		1	3	1				1	8	6	4	1			1	6	1							
Worthless check.....	14		11				6						1	42		38	1		16		4		1						
False pretense.....									2	1	1		1		1	3			3		4								
Carnal knowledge, etc.....																													
Crime against nature.....																													
Slot machine laws.....														1		2	1												
Kidnaping.....																													
Revenue act violations.....																													
Miscellaneous.....	26	3	41	2			1	22	1	8				39	2	42	3		13		7	1	1						
Totals.....	1626	67	1074	477	42	2	137	2	311	22	217	54	4	20	1	2191	94	2027	133	16	113	4	401	35	314	23	1	69	1

Convictions.....	3327	Convictions.....	4578
Bound over.....	62	Bound over.....	132
Other dispositions.....	507	Other dispositions.....	712
	3956		5422

SEVENTH JUDICIAL DISTRICT

SEVENTH JUDICIAL DISTRICT INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White			Negro			Indian			Unclas-sified			White			Negro			Indian			White		
	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M
Assault.....	25	1	21	5									16	3	25							5		
Assault and battery.....	63	1	85	7									51	3	63	7						12	5	
Assault with deadly weapon.....	33	3	117	30									26	2	125	26						9	2	
Assault on female.....	11		24										10		33							1		
Assault with intent to kill.....	1														3									
Assault with intent to rape.....																								
Assault—secret.....													1									1		
Drunk—drunk and disorderly.....	980		48	334	39								1024	46	468	26						27	3	
Possession—illegal whiskey.....	23	2	38	8									19		42	4						2		
Possession for sale—sale.....	4		17	6									6		18	2								
Manufacturing—																								
possession of material for	4		8										2		10	1								
Transportation.....	5		7										7	1	6									
Violation liquor laws.....	2		1	1									1		2	1								
Driving drunk.....	111	3	48	2									135	4	57							3	11	
Reckless driving.....	124	3	68										34	1	56	1						34	1	
Hit and run.....	13		8										10	1	8							1	6	
Speeding.....	209	9	53										251	8	52							4	2	
Auto license violations.....	98	9	98	2									118	9	132	3						12	5	
Violation motor vehicle laws.....	63		70										245	11	147	3						157	5	
Breaking and entering			2										1		1									
“and larceny																								
“and receiving																								
House-breaking.....	2		5	2									4	1	6							4		
“and larceny																								
“and receiving																								
Storebreaking.....																								
“and larceny																								
“and receiving																								
Larceny.....	29	1	65	11									16	1	33	1								
Larceny and receiving.....			1																					
Larceny from the person.....																								

Larceny of automobile.		2						9	5				1				1			1	3
Temporary larceny.	3	2							2		1								1		
Murder—first degree.								2	4	1									2	1	
Murder—second degree.									1												
Manslaughter.																			2		
Burglary—first degree.																				4	
Burglary—second degree.								1	2								1		1		
Abandonment.	4	5	1								6	7							1		
Abduction.																			1		
Affray.	32	3	25	8				10	1		35	3	28	10			2	11	14	3	
Arson.									1	1									1		
Bigamy.								1	1												
Bribery.																					
Burning other than arson.																					
Carrying concealed weapon.	19	36	2					5	3		11	44					2	1	2		
Contempt.																					
Conspiracy.																					
Cruelty to animals.											1						1				
Disorderly conduct.	83	16	85	28				6	1	7	66	8	72	17			1	10	1	3	
Disorderly house.	2	1	1	1				1	2											1	
Disposing of mortgaged property.											1										
Disturbing religious worship.	1																				
Violation of election laws.																					
Embezzlement.								1											3	1	
Escape.											6	3									
Failure to list tax.																					
Food and drug laws.																					
Fish and game laws.	7	1									1										
Forcible trespass.	8	2						4					2						1		
Forgery.								1										5	8		
Fornication and adultery.	2	2	10	12					3	4	2	1	15	8				1	5	4	
Gambling and lottery laws.	38	43	2					10	8		14	1	59	1			1	1	12		
Health laws.																					
Incest.																					
Injury to property.	17		8	7				5	4		11		6	1				2	4	1	
Municipal ordinances.	110	7	27	1				5	5		136	9	77	1				11	3	4	
Nonsupport.								6	4		28		42				2	10	2		
Nonsupport of illegitimate child.	1		5						1				7						4		

SEVENTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947																			
	CONVICTIONS						OTHER DISPOSITION						CONVICTIONS						OTHER DISPOSITIONS													
	White		Negro		Indian		Unclas-sified		White		Negro		Indian		Unclas-sified		White		Negro		Indian		Unclas-sified									
M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F							
Nuisance.....	7	1	2															1														
Official misconduct.....																																
Perjury.....										2																						
Prostitution.....			1															3	4													
Rape.....										1																						
Receiving stolen goods.....										1																						
Removing crop.....			1							1																						
Resisting officer.....																																
Robbery.....	2	1	7															9	8													
Seduction.....										20	1							1	1													
Slander.....																		1														
Trespass.....	16		18							4	2							18	4	20	3											
Vagrancy.....	1	1	5	4						1								10	3	5	1											
Worthless check.....	17	1	16	1						4	1	3						25	2	12												
False pretense.....	3	1	1							2	3							2		2												
Carnal knowledge, etc.....																																
Crime against nature.....										1																						
Slot machine laws.....										5																						
Kidnaping.....																		2	1													
Revenue act violations.....																																
Miscellaneous.....	74	13	45	6						15	1	9	2					50	5	51	16			4								
Totals.....	2283	128	1637	194		7	261	15	258	38								2494	135	1786	141			222	10	236	24	274	33		30	4
Convictions.....4249																																
Bound over.....136																																
Other dispositions.....436																																
Convictions.....4788																																
Bound over.....102																																
Other dispositions.....949																																
Totals.....5389																																

Convictions.....
Bound over.....
Other dispositions.....

4249
136
436
4821

Convictions.....
Bound over.....
Other dispositions.....

4788
102
949
5389

EIGHTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	63	4	39	17			2	3	28	6	18	4			9		43	3	33	11			6	25
Assault and battery.....	2																							
Assault with deadly weapon.....	36	1	111	43	1		9		34	3	47	20			5		38	3	108	31			5	3
Assault on female.....	87		176				5		64		73				10		82		155				6	71
Assault with intent to kill.....	2	1	7	1	1				5	1	8	1			3		4		10				4	5
Assault with intent to rape.....									4								1						2	1
Assault—secret.....																	2		1				1	2
Drunk—drunk and disorderly.....	1306	89	480	63			42	7	63	5	16	1			1		1023	43	421	51			35	5
Possession—illegal whiskey.....	183	3	83	14	1		1		44	2	18	2					150	5	97	13			9	36
Possession for sale—sale.....	12	2	18	8					11	3	7	2					13	2	13	4				1
Manufacturing— possession of material for Transportation.....	6		8								2						15	1	7				1	1
Violation liquor laws.....	45	1	37	3	1				10		5				2		25	1	25				4	8
Driving drunk.....	306	12	61	1	2				5	109	1	14			4		29	3	26	10			6	4
Reckless driving.....	306	9	129	4			1	19	71	2	21	1			6		337	6	76	2			32	70
Hit and run.....	11		7						10	1	2				1		17	1	5				2	17
Speeding.....	1245	50	205	2			143	4	42	2	2				4		929	41	110				62	4
Auto license violations.....	376	19	137	4	1		27	3	74	6	53	2	1		21		412	49	208	7			32	2
Violation motor vehicle laws.....	222	3	143	3	1		28		20		16	1			3		399	12	103	3	2		28	1
Breaking and entering and larceny.....							3	2	2								2						1	3
Housebreaking.....	1		2				1		1		3						1		2					6
and larceny.....																								2
Storebreaking.....							1		6		4						1		4	1			1	5
and larceny.....											1				3								3	3
Larceny.....																							3	1
Larceny and receiving.....	4		9				5		8	1	6				1		12	27	1				2	33
Larceny from the person.....	10	8	39	10			5		18	2	17	6			1		24	2	45	6			5	1
Larceny from the person.....	1			1							2													2

EIGHTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								
	White		Negro		Indian	Unclas-sified	White		Negro		Indian	Unclas-sified	White		Negro		Indian	Unclas-sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
	M	F	M	F			M	F	M	F			M	F	M	F			M	F	M	F	M	F																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																
Nuisance.....	3	1				1	3	7	1	2																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																														

Convictions.....	8,787
Bound over.....	234
Other dispositions.....	2,104
	11,125

Convictions.....	8,844
Bound over.....	174
Other dispositions.....	1,796
	10,814

NINTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense

[illegible]

[illegible]

TENTH JUDICIAL DISTRICT

THE TENTH JUDICIAL DISTRICT
OF THE STATE OF NEW YORK

[illegible][illegible]

[illegible]

TENTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS						OTHER DISPOSITION						CONVICTIONS						OTHER DISPOSITIONS					
	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified				
Nuisance.....	9	5	1																					
Official misconduct.....																								
Perjury.....	1																							
Prostitution.....																								
Rape.....																								
Receiving stolen goods.....	2	4																						
Removing crop.....																								
Resisting officer.....	52	1	37	6																				
Robbery.....																								
Seduction.....																								
Slander.....	1																							
Trespass.....	48	6	37	5																				
Vagrancy.....	7	2	2																					
Worthless check.....	24		6																					
False pretense.....	10	1	17																					
Carnal knowledge, etc.....																								
Crime against nature.....																								
Slot machine laws.....																								
Kidnaping.....																								
Revenue act violations.....	118	33	92	15																				
Miscellaneous.....																								
Totals.....	7062	379	4321	440																				

Convictions.....	12,246	Convictions.....	11,729
Bound over.....	271	Bound over.....	201
Other dispositions.....	495	Other dispositions.....	1,630
	14,012		13,650

Convictions.....	12,246	11,729
Bound over.....	271	291
Other dispositions.....	495	1,680
Total	14,012	13,650

ELEVENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS						
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F		
Assault.....	98	21	101	53		49	12	23	29				127	11	130	47						
Assault and battery.....																						
Assault with deadly weapon.....	79	5	411	133		60	13	133	61				73	7	445	139						
Assault on female.....	129		436			63		101					102		465							
Assault with intent to kill.....	2					2		11	1						1							
Assault with intent to rape.....						4		3														
Assault—secret.....																						
Drunk—drunk and disorderly.....	1349	90	661	95		11	2	3	1				1912	158	1353	190	1	16	7			
Possession—illegal whiskey.....																						
Possession for sale—sale.....																						
Manufacturing—																						
possession of material for																						
Transportation.....																						
Violation liquor laws.....	286	16	180	118		22	4	21	15				311	10	231	122		1	25	1	27	11
Driving drunk.....	261	5	58	1		9		1					288	10	76	1		26	1	3		
Reckless driving.....	289	8	86	1		277	21	93	2				290	8	99	2		359	31	117	3	2
Hit and run.....	3	1				2							5									
Speeding.....	676	26	90	3		2							1088	44	115	2		8				
Auto license violations.....	286	17	170	8		15	1	3					438	34	194	10		35	4	13	1	
Violation motor vehicle laws.....	98	3	47			5		4					202	6	59	1		11	1	5		
Breaking and entering.....																						
and larceny.....																						
and receiving.....																						
Housebreaking.....	1					2		3					1					1		5	3	
and larceny.....																						
and receiving.....						9		21	3									21		20	5	
Storebreaking.....						5												7		9		
and larceny.....																						
and receiving.....						31		20										40		39		
Larceny.....	112	11	93	27		90	8	62	16				47	7	110	21		60	4	81	19	
Larceny and receiving.....																						
Larceny from the person.....																						

[illegible]

TWELFTH JUDICIAL DISTRICT

TWELFTH JUDICIAL DISTRICT INFERIOR COURTS

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	277	39	149	45			3		81	9	26	14			3		214	32	122	33
Assault and battery.....			2																	
Assault with deadly weapon.....	124	15	124	64			2		77	11	57	31			2		93	7	120	45
Assault on female.....	215		282				6		77		71				3		228		316	
Assault with intent to kill.....	33	4	30	10					22	1	38	4					41	3	68	14
Assault with intent to rape.....									4		6				1					
Assault—secret.....				1													2			
Drunk—drunk and disorderly.....	3162	228	872	149	2		48	4	69	8	12	2	2		2		2828	190	971	154
Drunk—illegal whiskey.....	130	5	49	13			2		15		5	2					112	3	112	51
Possession for sale—sale.....	59	6	114	92			2		7	2	21	10			1		28	1	50	42
Manufacturing— possession of material for.....	3		1														1			
Transportation.....	22	1	12						6		3	2					18	1	26	1
Violation liquor laws.....	245	12	109	28			11		27	1	11	4			1		256	6	85	33
Driving drunk.....	362	12	62				10	1	38	1	5				1		430	6	75	
Reckless driving.....	537	17	185	3			15	1	282	24	48				5		654	11	192	3
Hit and run.....	37	5	16	1			1		22	2	7				1		60		36	
Speeding.....	1421	43	178	3			36		6		1						2638	116	305	4
Auto license violations.....	467	44	185	10			14		82	4	16				2		668	56	290	15
Violation motor vehicle laws.....	128	3	38	1			3	1	7	1	2						393	9	91	3
Breaking and entering.....	5								10		15						4		1	
and larceny.....	1						4		4		4	1			1					
and receiving.....			2						68	3	79	2					2			
Housebreaking.....																				
and larceny.....																				
and receiving.....																				
Storebreaking.....																				
and larceny.....																				
and receiving.....																				
Larceny.....	40	12	39	13			4		32	4	29	6			1		58	1	48	4
Larceny and receiving.....	50	10	51	8			2		44	11	46	13			2		61	3	95	9
Larceny the from person.....	2		7	2					11	5	19	5					1		3	2

JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
CONVICTIONS										CONVICTIONS									
OTHER DISPOSITION					OTHER DISPOSITIONS					OTHER DISPOSITIONS									
White		Negro		Unclas- sified	White		Negro		Unclas- sified	White		Negro		Unclas- sified					
M	F	M	F	M	M	F	M	F	M	M	F	M	F	M					
7	1	3	3	---	4	2	5	2	---	1	1	2	---	---					
Nuisance.....																			
Official misconduct.....																			
Perjury.....																			
61	96	54	65	---	---	---	---	---	---	---	---	---	---	---					
Prostitution.....																			
3	1	2	1	1	6	4	---	---	---	47	47	36	38	---					
Receiving stolen goods.....																			
Removing prop.....																			
35	2	7	3	---	3	2	1	3	---	35	1	17	6	---					
Resisting officer.....																			
1	---	---	---	---	10	1	12	---	2	---	---	---	---	---					
Robbery.....																			
2	---	---	---	---	2	---	1	---	---	---	---	---	---	---					
Seduction.....																			
Slander.....																			
50	12	28	1	---	1	1	---	---	---	2	2	---	---	---					
Trespass.....																			
29	73	16	35	---	16	21	5	6	---	42	2	24	1	---					
Vagrancy.....																			
34	1	5	---	4	3	---	2	---	---	44	38	24	45	---					
Worthless check.....																			
4	7	3	---	---	16	---	2	---	---	76	---	3	---	---					
False pretense.....																			
1	---	---	---	---	4	---	---	---	---	18	8	8	1	---					
Carnal knowledge, etc.....																			
4	---	---	---	---	4	1	---	---	---	---	---	---	---	---					
Crime against nature.....																			
4	1	1	---	---	2	---	---	---	---	---	---	---	---	---					
Slot machine laws.....																			
Kidnaping.....																			
Revenue act violations.....																			
239	35	147	28	8	74	7	21	6	---	245	22	150	21	---					
Miscellaneous.....																			
9501	822	3767	918	2	190	8	1740	186	786	185	---	---	---	---					
Totals.....																			

CONVICTIONS.....15,298

Bound over.....520

Other dispositions.....2,432

18,160

CONVICTIONS.....17,577

Bound over.....481

Other dispositions.....2,423

20,481

Convictions	15,208
Bound over	520
Other dispositions	2,432
	<hr/>
	18,160

THIRTEENTH JUDICIAL DISTRICT

THIRTEENTH JUDICIAL DISTRICT INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947														
	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS								
	White			Negro			Indian			Unclas-sified			White			Negro			Indian			Unclas-sified					
	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	M	M	F	
Assault.....	110	6	90	24	4	7	36	3	27	3	4	68	11	75	11	1	32	2	42	11	19	2	17	2	17	2	
Assault and battery.....	11	1	9	—	—	—	2	—	3	—	—	10	—	6	2	—	2	1	2	5	3	—	2	—	2	—	
Assault with deadly weapon.....	72	2	109	27	—	6	33	3	40	6	4	74	6	158	40	5	33	1	50	1	37	6	8	2	8	2	
Assault on female.....	24	—	47	—	—	4	19	—	5	—	1	30	—	38	—	—	15	—	17	—	9	—	3	—	3	—	
Assault with intent to kill.....	1	1	4	1	—	—	3	—	3	—	—	5	—	1	—	—	2	—	9	—	6	—	1	—	1	—	
Assault with intent to rape.....	2	—	—	—	—	—	6	—	6	—	—	—	—	—	—	—	—	—	—	—	1	—	—	—	1	—	
Assault—secret.....	1	—	—	—	—	—	1	—	3	—	—	—	—	—	—	—	—	—	—	—	2	—	—	—	—	—	
Drunk—drunk and disorderly.....	1138	55	568	43	18	1	36	—	10	3	1	869	44	569	51	28	1	392	20	33	2	14	1	25	1	25	1
Possession—illegal whiskey.....	76	3	58	9	3	1	2	—	8	7	—	88	2	49	11	4	1	34	7	1	1	8	2	4	—	4	—
Possession for sale—sale.....	23	—	22	7	—	1	5	—	4	—	—	23	1	21	6	—	11	—	8	—	8	—	1	—	1	—	
Manufacturing— possession of material for Transportation.....	5	—	6	1	—	—	1	—	1	—	—	5	—	15	—	—	2	—	—	—	6	—	—	—	—	—	
Violation liquor laws.....	31	—	19	2	—	1	4	—	3	—	—	31	—	25	2	1	1	8	1	6	—	7	—	2	—	2	—
Driving drunk.....	39	—	48	6	—	6	11	—	2	4	—	9	1	36	4	—	3	—	2	—	2	—	—	—	—	—	
Reckless driving.....	334	1	125	—	3	5	19	1	8	—	—	285	2	98	—	4	104	2	32	1	10	—	5	—	5	—	
Hit and run.....	246	5	110	3	1	8	52	2	17	1	1	200	4	118	1	—	68	2	53	2	14	1	4	—	4	—	
Speeding.....	6	—	12	—	—	2	5	—	3	—	—	12	—	7	—	—	1	—	1	—	1	—	—	—	—	—	
Auto license violations.....	319	6	62	1	—	14	5	—	1	—	1	468	11	94	2	2	212	15	—	2	—	2	—	4	—	4	—
Violation motor vehicle laws.....	234	16	164	6	2	7	14	—	8	1	—	331	32	224	12	6	129	6	31	4	14	—	6	—	6	—	
Braking and entering.....	258	7	160	4	4	18	38	1	12	—	9	244	3	141	1	8	163	2	6	2	7	1	1	—	1	—	
and larceny.....	2	3	1	—	—	1	5	—	4	—	2	1	—	6	—	—	12	3	11	—	3	—	3	—	3	—	
Housebreaking.....	—	—	—	—	—	—	3	—	9	—	—	4	2	2	—	—	1	—	2	—	13	—	—	—	—	—	
and larceny.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
and receiving.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
Storebreaking.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
and larceny.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
and receiving.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
Larceny.....	19	2	44	6	—	1	23	—	13	2	1	17	—	39	5	1	11	1	18	2	25	6	9	—	9	—	
Larceny and receiving.....	8	—	29	7	—	—	1	—	8	3	—	12	—	21	3	—	—	—	—	—	7	—	—	—	—	—	
Larceny from the person.....	—	—	—	—	—	—	—	—	2	—	—	1	—	—	—	—	—	—	1	—	1	—	—	—	—	—	

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																				
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS															
	White		Negro		Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified														
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F											
Nuisance.....			1												1																
Official misconduct.....																															
Perjury.....																															
Prostitution.....	3	4	4	5					2	1																					
Rape.....									1	1																					
Receiving stolen goods.....	1		3	1	2		3	2	3		1																				
Removing crop.....					1																										
Resisting officer.....	36		13	1	2		1	1																							
Robbery.....			1				2	3			1																				
Seduction.....																															
Slander.....																															
Trespass.....	19		15		2		8	6																							
Vagrancy.....	6	1	3	1	1		2				1																				
Worthless check.....	19	1	1		1		1	1			1																				
False pretense.....	2		2				8	1																							
Carnal knowledge, etc.....							1	1																							
Crime against nature.....																															
Slot machine laws.....																															
Kidnaping.....																															
Revenue act violations.....																															
Miscellaneous.....	72	4	53	13	3	2	21																								
Totals.....	3342	129	1985	205	45	2	142	457	15	317	44	4	1	38	1	3116	145	2094	205	72	6	1404	61	534	45	315	28	8	2	158	13
	Convictions..... 5,850										Convictions..... 7,103																				
	Bound over..... 98										Bound over..... 139																				
	Other dispositions..... 779										Other dispositions..... 964																				
	6,727										8,205																				

FOURTEENTH JUDICIAL DISTRICT

**FOURTEENTH JUDICIAL DISTRICT
INFERIOR COURTS**

[illegible]

Larceny by trick and device.....	5	1	1	27	1	13	4	1	3	1	17	13	
Larceny of automobile.....	1	1		4		1	6	1	4	1	1	3	1
Temporary larceny.....					23	6					2	16	6
Murder—first degree.....													
Murder—second degree.....				14	1	1					17	1	2
Mandaughter.....				4	2						1	1	7
Burglary—first degree.....				1									
Burglary—second degree.....				5	1								
Abandonment.....	11	1	2				22	1	11		3	3	
Abduction.....	134	15	32	36	16	3	159	6	54	28	4	1	56
Affray.....				1							1	2	1
Arson.....				4	1						4		
Bigamy.....	1												
Bribery.....													
Burning other than arson.....				23	1	7	109	7	161	12	8	1	16
Carrying concealed weapon.....	68	3	67			1	1						2
Contempt.....	3										4		
Conspiracy.....							1						
Cruelty to animals.....				38	9	18	177	41	172	82	1	3	
Disorderly conduct.....	168	37	111	1	1	2	1	1			40	11	17
Disorderly house.....			1		4		2					1	4
Disposing of mortgaged property.....	1						1	3	3				
Disturbing religious worship.....			3										
Violation of election laws.....				6	5		2	2			6	4	
Embezzlement.....									1				
Escape.....	1	3											
Failure to list tax.....													
Food and drug laws.....	5	2					2	3		1	10		
Fish and game laws.....	8	4	10				16	1	10	1	6	7	5
Foreble trespass.....	2	1		2	3	2	3					10	1
Forgery.....	8	13	4	5	3	4	18	11	18	18	4	2	1
Fornication and adultery.....	174	3	270	32	1	24	122	2	144		2	9	19
Gaming and lottery laws.....							6		1		1		
Health laws.....	4	1											
Incest.....				45	3	10	56	4	28	5	49	1	9
Injury to property.....	68	6	17	28	2	3	394	17	133	5	46	4	19
Municipal ordinances.....	348	11	78	17	4		43	1	16		33	1	14
Nonsupport.....	44	15	4										
Nonsupport of illegitimate child.....	3	2		1			1				3		2

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS				
	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified	White	Negro	Indian	Unclas-sified				
Nuisance	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F				
Official misconduct	4	1																		
Perjury																				
Prostitution	162	136	43	35	12	15	20	4	37	32	9	7	8	8	4	3				
Rape					1	7	7	1	1	1	1	1	4	6	1	1				
Receiving stolen goods	2	1	7	1	7	7	1		1	1	1	1	6	1	4	1				
Removing crop																				
Resisting officer	36	1	6	4	9	1	3		40	5	18	5	20	2	4	1				
Robbery	1	2			20	1	20		1	1	1		18	24	1					
Seduction					1															
Slender					1	2	1		1				1							
Trespass	34	7	22	1	24	7	9	1	39	5	11	4	22	5	4	2				
Vagrancy	7	7	3	1	10	2	2		6	10			18	4	6					
Worthless check	26	7	1		4	2			43	2	2		22	1	3					
False pretense					1				2		1		12	1	13					
Carnal knowledge, etc.	2	2	2	1	14	7	6	1	2				1	1	1					
Crime against nature													1	1						
Slot machine laws					5	5			3		1	1	9	3						
Kidnaping	1								2											
Revenue act violations	48	1	26		1				15		2									
Miscellaneous	305	37	121	15	46	5	10	1	373	34	120	19	1	61	11	31				
Totals	11799	1080	3768	647	5	45	3	1222	131	881	195	13	1263	1081	454	674				
Convictions	17,344																			
Bound over	502																			
Other dispositions	1,940																			
Convictions	19,342																			
Bound over	519																			
Other dispositions	2,535																			
Totals	22,396																			

Convicted.....	17,344
Bound over.....	502
Other dispositions.....	1,940
	<hr/>
	19,786

FIFTEENTH JUDICIAL DISTRICT

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS				
	White		Negro		Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified			
Assault.....	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F		
Assault and battery.....	61	12	39	13	5	19	6	8	4	1	70	15	38	12	26	3	9	2		
Assault with deadly weapon.....	115	5	121	37	6	42	4	30	3	3	71	8	144	40	9	1	35	3		
Assault on female.....	52	55	4	21	4	1	15	3	3	1	53	76	18	2	22	18	3	5		
Assault with intent to kill.....	1					1	3	3	3	1					3			3		
Assault with intent to rape.....								3												
Assault—secret.....																				
Drunk—drunk and disorderly.....	705	28	203	14	22	13	5	5			698	33	245	19	19	10	1			
Possession—illegal whiskey.....	61	2	29	4	5	1	4	4	1		62	3	32	5	7	5				
Possession for sale—sale.....	16	2	21	14		1					25	18	6		3	1		1		
Manufacturing—possession of material for.....	1																			
Transportation.....	19	2	2		2			2			1		3		4		2			
Violation liquor laws.....	55	4	44	7		5		3	1		11		24	5	3					
Driving drunk.....	461	6	73	1	13	12		3		3	410	6	73	1	6	9	1			
Reckless driving.....	239	4	45		4	32	4	10	1	7	194	2	42		33	3	2	2		
Hit and run.....	36	2	13	1	2	2	1	2			22	1	9		1	6				
Speeding.....	999	20	121	2	34	10				1	1394	28	142	1	31	1	7	1		
Auto license violations.....	113	8	29	2	5	3	1				216	14	76	1	3	4	1	1		
Violation motor vehicle laws.....	70	12			1	2	1				123	3	35		2	2	1			
Breaking and entering.....	2	1				8	1	2		1	3									
and larceny.....															1		3			
and receiving.....																				
Housebreaking.....	6					7		1		1	1		3							
and larceny.....																				
and receiving.....																				
Storebreaking.....																				
and larceny.....																				
and receiving.....																				
Larceny.....	25	3	22	12	1	9	3	11	1		26	15	26	8	8	3	2	1		
Larceny and receiving.....	47	5	31	7	1	12	12													

Offense	JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947													
	CONVICTIONS					OTHER DISPOSITIONS					CONVICTIONS					OTHER DISPOSITIONS								
	White		Negro		Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	61	12	39	13	5	19	6	8	4		1	70	15	38	12		6	26	3	9	2		3	
Assault and battery.....	115	5	121	37	6	42	4	30	3		3	71	8	144	40		9	35	3	14	12		5	
Assault with deadly weapon.....	52		55		4	21		15			1	53		76			2	22		18			3	
Assault on female.....	1					1		3				1						3						
Assault with intent to kill.....																								
Assault with intent to rape.....																								
Assault—secret.....																								
Drunk—drunk and disorderly.....	705	28	203	14	22	13		5				698	33	245	19		19	10	1					
Possession—illegal whiskey.....	61	2	29	4	5	1	4	4	1			62	3	32	5		7	7		5				
Possession for sale—sale.....	16	2	21	14		1						25		18	6		1	3		1			1	
Manufacturing—possession of material for.....	1																							
Transportation.....	19	2	2		2			2	2			1		3				4		2				
Violation liquor laws.....	55	4	44	7		5		3	1			11		24	5		3	4						
Driving drunk.....	461	6	73	1	13	12		3			3	410	6	73	1		6	9	1	1			2	
Reckless driving.....	239	4	45		4	32	4	10	1		7	194	2	42			3	33	3	2				
Hit and run.....	36	2	13	1	2	2	1	2			22	1	9			1	6							
Speeding.....	999	20	121	2	34	10					1	1394	28	142	1		31	1	7	1				
Auto license violations.....	113	8	29	2	5	3	1					216	14	76	1		3	4	1	1				
Violation motor vehicle laws.....	70	12			1	2	1					123	3	35			2	2	1					
Breaking and entering.....	2	1				8	1	2			1	3												
and larceny.....																		1		3				
and receiving.....																								
Housebreaking.....	6					7			1		1	1												
and larceny.....																								
and receiving.....																								
Storebreaking.....																								
and larceny.....																								
and receiving.....																								
Larceny.....	25	3	22	12	1	9	3	11	1			26	15	26	8			8		3	2		1	
Larceny and receiving.....	47	5	31	7	1	12		12	1		2	26		24	8		2	3	1	3				
Larceny from the person.....	1																							

[illegible]

SIXTEENTH JUDICIAL DISTRICT

SIXTEENTH JUDICIAL DISTRICT INFERIOR COURTS

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	CONVICTIONS										OTHER DISPOSITIONS										CONVICTIONS										OTHER DISPOSITIONS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																			
	White					Negro					Indian					Unclas- sified	White					Negro					Indian					Unclas- sified	White					Negro					Indian					Unclas- sified																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																		
	M		F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F			M	F		M	F		M	F		M	F		M	F			M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	F		M	

[illegible]

JANUARY 1, 1947—DECEMBER 31, 1947

Offense	JANUARY 1, 1946—DECEMBER 31, 1946						JANUARY 1, 1947—DECEMBER 31, 1947					
	CONVICTIONS			OTHER DISPOSITION			CONVICTIONS			OTHER DISPOSITIONS		
	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
Nuisance.....	5	3	4	1	1	1	1	1	1	1	1	1
Official misconduct.....	1											
Perjury.....	9	9	7	8	1	3	1	2	5	2	8	3
Prostitution.....	2				2				1			
Rape.....	2				2				1			
Receiving stolen goods.....	34	4	1	3	2	4	1	1	34	6		6
Removing crop.....	1				5	2			3			15
Resisting officer.....	1				1				3			1
Robbery.....	1				1				1			1
Seduction.....	1				1				1			1
Slander.....	20	1	9	1	10	5	2	2	17	7	16	7
Trespass.....	2	16	3	3	2	2	1	4	10	14	2	2
Vagrancy.....	8		1		3				40	2	5	11
Worthless check.....					4	1			7	1	2	5
False pretense.....	1					1			1			1
Carnal knowledge, etc.....						1						3
Crime against nature.....						1						
Slot machine laws.....	9								11			
Kidnaping.....					1							
Revenue act violations.....	155	9	42	4	6	2	3	8	164	9	45	5
Miscellaneous.....												
Totals.....	442	183	116	156	276	18	568	51	200	27		22
									2	621	394	178
									48	5	838	74
									230	45		14
												2

Convictions..... 6,223

Bound over..... 136

Other dispositions..... 704

7,123

Convictions..... 8,479

Bound over..... 161

Other dispositions..... 1,042

9,682

SEVENTEENTH JUDICIAL DISTRICT

INFERIOR COURTS

[illegible]

[illegible]

SEVENTEENTH JUDICIAL DISTRICT—(Continued)

INFERIOR COURTS

		JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
		CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS				
		White		Negro		Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White	Negro	Indian	Unclas- sified
Offense		M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Nuisance.....																					
Official misconduct.....																					
Perjury.....				5	1																
Prostitution.....																					
Rape.....																					
Receiving stolen goods.....																					
Removing crop.....																					
Resisting officer.....																					
Robbery.....	2																				
Seduction.....																					
Slander.....																					
Trespass.....																					
Vagrancy.....																					
Worthless check.....														1							
False pretense.....																					
Carnal knowledge, etc.....																					
Crime against nature.....																					
Slot machine laws.....																					
Kidnaping.....																					
Revenue act violations.....																					
Miscellaneous.....	6											4									
Totals.....	123	6	50	2				2				39	1	9	2			2			

Convictions.....	181	Convictions.....	51
Bound over.....	0	Bound over.....	0
Other dispositions.....	2	Other dispositions.....	2
	183		53

EIGHTEENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

JANUARY 1, 1946—DECEMBER 31, 1946

JANUARY 1, 1947—DECEMBER 31, 1947

[illegible]

[illegible]

EIGHTEENTH JUDICIAL DISTRICT—(Continued) INFERIOR COURTS

JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS				
White		Negro		Unclas- sified	White		Negro		Unclas- sified	White		Negro		Unclas- sified	White		Negro		Unclas- sified
M	F	M	F	M	M	F	M	F	M	M	F	M	F	M	M	F	M	F	M
Offense																			
Nuisance.....	2																		
Official misconduct.....																			
Perjury.....					1					4	2				1				
Prostitution.....	3	6			1	3									7	2			
Rape.....					2										7				
Receiving stolen goods.....					4		1			1	2			2	1			2	
Removing crop.....																			
Resisting officer.....	26	2	1							3	4	1		2	2	2			
Robbery.....										1				3	5			1	
Seduction.....					2									1					
Slander.....															2				
Trespass.....	9	3			3	4	3			6	2			1	4	2			
Vagrancy.....	4	4			1					1	1				1				
Worthless check.....	14	1			3	1	1			44	1	1		6	3				
False pretense.....	2	1			2	2				1					4			1	
Carnal knowledge, etc.....										1									
Crime against nature.....																			
Slot machine laws.....	13	1								7	1			1				1	
Kidnaping.....																			
Revenue act violations.....	39	13	10	6						19	2	4	1		7	19	2	3	2
Miscellaneous.....																			
Totals.....	1456	81	291	45	4	407	37	105	22	1321	62	235	35	247	6	369	42	76	10

Convictions.....	1,877	Convictions.....	1,876
Bound over.....	60	Bound over.....	69
Other dispositions.....	513	Other dispositions.....	482
	2,450		2,427

NINETEENTH JUDICIAL DISTRICT

JANUARY 1, 1947—DECEMBER 31, 1947

JANUARY 1, 1946—DECEMBER 31, 1946

OTHER DISPOSITIONS

Year	1990	1991	1992	1993
1990	1991	1992	1993	1994

DATE	DESCRIPTION	AMOUNT	BALANCE
1900			
1901			
1902			
1903			
1904			
1905			
1906			
1907			
1908			
1909			
1910			
1911			
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2021			
2022			
2023			
2024			
2025			
2026			

M	F	M	F	M	F
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49	12	16	4
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[illegible][illegible][illegible][illegible]

212	14	22	7	---	---	---
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JANUARY 1, 1947—DECEMBER 31, 1947

Convictions.....	5,298
Bound over.....	223
Other dispositions.....	1,580
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	7,071

TWENTIETH JUDICIAL DISTRICT

TWENTIETH JUDICIAL DISTRICT

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TWENTIETH JUDICIAL DISTRICT—(Continued) INFERIOR COURTS

		JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947									
		CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS				
		White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified	White	Negro	Indian	Unclas- sified				
Offense	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F			
Nuisance.....																					
Official misconduct.....																					
Perjury.....																					
Prostitution.....																					
Rape.....																					
Receiving stolen goods.....																					
Removing crop.....																					
Resisting officer.....	1									2											
Robbery.....																					
Seduction.....																					
Slander.....	1																				
Trespass.....	1																				
Vagrancy.....	1																				
Worthless check.....			2							1											
False pretense.....																					
Carnal knowledge, etc.....																					
Crime against nature.....																					
Slot machine laws.....																					
Kidnaping.....																					
Revenue act violations.....	20					1	1			9											
Miscellaneous.....																					
Totals.....	883	14	11	1	1	49	3	1		639	8	19	2	16	1						
		890										908									
		Convictions.....										Convictions.....									
		Bound over.....										Bound over.....									
		Other dispositions.....										Other dispositions.....									
		46										4									
		943										685									

Convictions.....	890	888
Bound over.....	7	13
Other dispositions.....	46	4
	943	685

TWENTY-FIRST JUDICIAL DISTRICT

TWENTY-FIRST JUDICIAL DISTRICT INFERIOR COURTS

Offense	JANUARY 1, 1946—DECEMBER 31, 1946												JANUARY 1, 1947—DECEMBER 31, 1947											
	CONVICTIONS						OTHER DISPOSITIONS						CONVICTIONS						OTHER DISPOSITIONS					
	White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified		White		Negro		Indian		Unclas- sified	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Assault.....	52	7	23	4					11	3	6	1					74	13	42	19				
Assault and battery.....																								
Assault with deadly weapon.....	74	1	64	7					46	2	23	2					64	7	127	13				
Assault on female.....	67		45						12		4						32		30	7				
Assault with intent to kill.....									3		4						28		18					
Assault with intent to rape.....	1								1		1						4		2					
Assault—secret.....																								
Drunk—drunk and disorderly.....	892	11	170	16					15	2	5						1018	34	320	26				
Possession—illegal whiskey.....	15		6	1													201	9	51					
Possession for sale—sale.....	8																28	3	18	1				
Manufacturing—																								
possession of material for	5		2																					
Transportation.....	12		3	1																				
Violation liquor laws.....	156	6	35	11					17		6	3					36		14					
Driving drunk.....	204	2	43	1					7								314	2	64	1				
Reckless driving.....	187	2	66						29	1	9						192	34	69					
Hit and run.....	19		4								2						13		11					
Speeding.....	178	2	50						9	1	1						396	5	84	1				
Auto license violations.....	140	6	60	3					3	1							269	35	102	2				
Violation motor vehicle laws.....	30		8						2		1						36		28					
Breaking and entering.....									3								2							
and larceny.....			3						1		1						1							
and receiving.....	1								10		1													
Housebreaking.....																								
and larceny.....																								
and receiving.....																								
Storebreaking.....																								
and larceny.....																								
and receiving.....																								
Larceny.....	18	1	7	1																				
Larceny and receiving.....	8		10	4																				
Larceny from the person.....																								

TWENTY-FIRST JUDICIAL DISTRICT—(Continued) **INFERIOR COURTS**

		JANUARY 1, 1946—DECEMBER 31, 1946										JANUARY 1, 1947—DECEMBER 31, 1947																			
		CONVICTIONS					OTHER DISPOSITION					CONVICTIONS					OTHER DISPOSITIONS														
Offense		White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified	White		Negro		Indian	Unclas- sified						
		M	F	M	F	M		M	F	M	F	M		M	F	M	F	M		F	M	M	F	M		F	M	F			
Nuisance.....	1	2												3	1	2				1				1							
Official misconduct.....																															
Perjury.....																															
Prostitution.....	4	3	2	2				2		1	1			2	1	1	2			1	1	1									
Rape.....								2												4		2									
Receiving stolen goods.....								3		1				2																	
Removing crop.....																															
Resisting officer.....	15	4						3	1					20	10	4				2											
Robbery.....	2							4		4				1					6		2										
Seduction.....								1											1												
Slander.....																															
Trespass.....	26	1	19					1		2				44	2	26	5			6	2	5		3							
Vagrancy.....		3	2	2				4		1				6	4	4	2			2	2	1									
Worthless check.....	3							1						13		3				1		1									
False pretense.....	1	2								1				3		1				1											
Carnal knowledge, etc.....								2		1									2												
Crime against nature.....								6											1		1										
Slot machine laws.....														3	5	1				1											
Kidnaping.....	3	1						2																							
Revenue act violations.....																															
Miscellaneous.....	126	6	32	4				26	3	4	2			315	13	40	4		1												
Totals.....	2531	63	804	69			3	325	23	114	23		8	3371	152	1421	134		39					16							
		Convictions.....										Convictions.....										Convictions.....									
		Bound over.....										Bound over.....										Bound over.....									
		Other dispositions.....										Other dispositions.....										Other dispositions.....									
		3,490										3,490										5,117									
		115										115										151									
		378										378										518									
		3,983										3,983										5,786									

Convictions.....	3,490
Bound over.....	115
Other dispositions.....	378
	3,983

Convictions.....	5,117
Bound over.....	151
Other dispositions.....	518
	5,786

ALPHABETICAL LIST OF CRIMES IN INFERIOR COURTS

	1946		1947	
	Convictions	Other Dispositions	Convictions	Other Dispositions
Assault.....	3620	1146	3843	1303
Assault and battery.....	760	155	728	200
Assault with deadly weapon.....	4315	2218	4699	2343
Assault on female.....	2482	930	2764	1075
Assault with intent to kill.....	124	216	201	289
Assault with intent to rape.....	6	56	4	60
Assault—secret.....	9	23	7	10
Drunk—drunk and disorderly.....	38286	1093	41295	1239
Possession—illegal whiskey.....	1724	267	2383	277
Possession for sale—sale.....	953	179	857	197
Manufacturing—possession of material for.....	148	25	28	43
Transportation.....	507	98	569	114
Violation liquor laws.....	3226	500	3325	558
Driving drunk.....	6502	713	7364	955
Reckless driving.....	5750	2121	5965	2285
Hit and run.....	458	210	473	240
Speeding.....	13049	260	18387	454
Auto license violations.....	5882	585	9106	1046
Violation motor vehicle laws.....	3898	291	6669	454
Breaking and entering.....	62	212	73	211
and larceny.....	30	114	41	191
and receiving.....	28	253	17	234
Housebreaking.....	5	27	3	16
and larceny.....	16	51	3	58
and receiving.....		54	8	60
Storebreaking.....	2	6	5	24
and larceny.....	7	156	4	207
and receiving.....	1	67	11	145
Larceny.....	1801	1217	1836	1119
Larceny and receiving.....	543	380	625	415
Larceny from the person.....	19	109	15	91
Larceny by trick and device.....	8	20	4	19
Larceny of automobile.....	58	245	56	194
Temporary larceny.....	82	27	79	28
Murder—first degree.....		119		119
Murder—second degree.....		12		13
Manslaughter.....		106		125
Burglary—first degree.....		23		33
Burglary—second degree.....		19		14
Abandonment.....	625	224	807	273
Abduction.....	2	7	1	12
Affray.....	1643	456	1852	484
Arson.....		20		28
Bigamy.....	4	43	5	37
Bribery.....		8	1	12
Burning other than arson.....				
Carrying concealed weapon.....	1476	244	1845	221
Contempt.....	9		5	1
Conspiracy.....	24	36	17	15
Cruelty to animals.....	25	9	39	20
Disorderly conduct.....	2741	479	2555	475
Disorderly house.....	57	53	34	24
Disposing of mortgaged property.....	34	16	72	50
Disturbing religious worship.....	38	18	51	13
Violation of election laws.....				
Embezzlement.....	25	74	22	73
Escape.....	156	6	157	15
Failure to list tax.....				
Food and drug laws.....			2	
Fish and game laws.....	106	26	133	61
Forcible trespass.....	376	89	391	93
Forgery.....	19	176	18	298

ALPHABETICAL LIST OF CRIMES IN INFERIOR COURTS

	1946		1947	
	Convictions	Other Dispositions	Convictions	Other Dispositions
Fornication and adultery.....	766	206	838	192
Gaming and lottery laws.....	2776	274	2745	272
Health laws.....	181	34	205	24
Incest.....	1	3		2
Injury to property.....	1018	354	1027	409
Municipal ordinances.....	4730	366	5139	442
Nonsupport.....	1550	628	2059	800
Nonsupport of illegitimate child.....	220	84	308	106
Nuisance.....	561	103	515	116
Official misconduct.....				1
Perjury.....	2	20	2	10
Prostitution.....	1131	193	604	107
Rape.....		90		92
Receiving stolen goods.....	78	79	67	81
Removing crop.....	7	8	6	9
Resisting officer.....	701	89	641	128
Robbery.....	17	230	37	270
Seduction.....	3	15	6	14
Slander.....	9	23	12	24
Trespass.....	737	300	819	364
Vagrancy.....	453	299	514	387
Worthless check.....	520	133	1037	209
False pretense.....	153	135	168	181
Carnal knowledge, etc.....	4	21	7	35
Crime against nature.....	8	41	6	47
Slot machine laws.....	46	2	108	2
Kidnaping.....	1	12	2	8
Revenue act violations.....	75	2	17	2
Miscellaneous.....	3436	838	3899	968
Totals.....	120,905	20,867	140,502	23,965
Total for 1946.....				141,772
Total for 1947.....				164,467
Grand total for 2-year period.....				306,239

INDEX

A

A.B.C. Act: See Intoxicating Beverages	
A.B.C. Stores: See Intoxicating Beverages	
A. & I. College:	
Army Camps; Property	606
Graduate Courses; Residents; expenses of Students Attending	
Out-of-State Colleges	605
Abattoirs: Public Health	358
Abattoirs and Markets: Inspection	366
Accountant: Public; Use of title "Accountant"	635
Adjutant General: Opinions to	316-317
Adoption:	
Child as Ward of Court; Interlocutory Order; Custody	487
Consent; Addressed to Clerk of Court of County other than of Adoption	483
Child Born in Wedlock but Alleged to be Illegitimate	476
County Superintendent of Welfare	495
Insane Mother	504
Presumptive rather	486
Superintendent of Public Welfare	688
Custody of Child upon Dismissal of Proceeding	486
Effect of Instrument Transferring Guardianship	488
Father's Refusal to Consent; Abandonment; Failure to Answer Petition	500
Illegitimate Child of Married Woman; Consent; Proof of Non-access	680
Interstate Transfer of Children	485
Juvenile Court; Jurisdiction	503
More than One Child in a Single Proceeding	679
Natural Guardians; Consent	489
Necessity of Consent	486
Residence on Military Reservation	504
Second Petitioner after Issuance of Interlocutory Order	467
Surrendering Child to County Superintendent of Public Welfare	484
Surviving Petitioner	485
Aeronautics:	
Aircraft Fuel Tax	664
Dangerous Flying	626
Aerial Mapping	
Agricultural Associations: Taxation; Exemptions	246
Agricultural Co-operative Associations	257
Agriculture:	
Bleached Flour	255
Crop Improvement Associations; Right to Fix Prices	611
Farm Crop Seed Improvement Division; Hybrid Corn	610
Fertilizer Law; Departmental Regulations	262
"First or Primary Markets"; Contract Haulers	336
Food and Drug Law; Oleomargarine	263
Linseed Oil; Inspection Tax	265
Livestock Markets	260
Marketing and Branding Farm Products	255
N. C. Food, Drug and Cosmetic Act	268
Food; Oleomargarine; Serving in State Institutions	589
Seed Law	264
Seed Potatoes; Regulations	267
Tobacco Curers	257
Weights and Measures	264
Airports: Right of Municipality to Lease	693
Aliens: Right to Hold and Convey Realty; Right to Bring Suit	700
American Legion:	
Intangibles Tax; Bank Deposits	251
Sale of Beer and Wine at Post	660
Archives and History, Department of:	
Opinions to	510-511
Original Carolina Charter of 1663	277
Records	425
Arrests: Authority to Make	670
Ashford Oil Company	199
Assistant Attorneys General: Revenue Department	17
Attorney General:	
Advisory Opinions to Local Officials	20
Criminal Cases Argued before Supreme Court of N. C. (Exhibit II)	8-15
Fees Transmitted to State Treasurer	15
Office Conferences and Consultations	20
Staff Personnel	17
Summary of Activities	17
Attorneys at Law: Practice of Law Without a License	675
Attorneys General: List of Since 1776	3
Auditor: See State Auditor	3
Automobiles: See Motor Vehicles	

B

B. C. Remedy Company: Income Tax; Deductions	211
Bad Checks: License Tax; Penalty	213
Banks and Banking:	
Acceptances: Letters of Credit	402
Bank of Mayodan as Trustee	406
Bonds of World Bank; Limitation on Loans	409
Branch Banking and Trust Company	404-405
Educational Institutions; Authority to Borrow Money	402
Final Accounts for Estates	654
Foreign Banks; Qualification as Executor or Trustee in This State	697
Foreign Corporations	672
Intangibles Tax on Deposits; Right to Assume	408
Limitation on Letters of Credit	402
Limitation on Loans	409
Loans to Officers of Bank; Approval; Security	413
Loans to Officers or Employees; Restrictions	412
Municipal License or Privilege Tax	673
Municipal Taxation; Industrial Banks	410
Notary Public as Officer of Bank	411
Private Bankers; Authority to Operate	409
Public Funds; A.B.C. Board Funds; C.S.C. Funds	410
Stockholder's Book; Right of Inspection	407
Unclaimed Deposits	407
Banks, Commissioner of: Opinions to	402-413
Barber Examiners: License Fees	512
Barber Examiners, Board of: Opinions to	512
Barbers Schools: Permits; Notice of Refusal to Issue	512
Beer and Wine: See Intoxicating Beverages	
Bills and Notes: Worthless Checks; Aiding and Abetting in Issuance	670
Blind:	
Aid to Needy; Disclosure of Name	575
Definition of Blind Persons	572
Eligibility for Relief	572
Blue Sky Law: Domestic Air Line Stock	45
Board of Barbers Examiners: Opinions to	512
Board of Charities and Public Welfare: Opinions to	467-506
Board of Correction and Training:	
Charitable and Penal Institutions	509
Opinions to	509
Board of Education: Executive Sessions	673
Board of Examiners of Plumbing and Heating Contractors: Opinions to	528-531
Boiler Inspection Act: Non-Code Boilers	320
Bonds: Cleveland County Act	71
Bonus Act of 1947: State Employees	318
Bookmobiles: Gasoline Tax	522
Boy Scouts of America: Solicitation of Donations	469
Budget Bureau:	
Department of Conservation and Development; License Fees	273
Opinions to	273-277
Building and Loan Associations:	
Joint Stock Signature	309
Trustees; Officers and Attorneys	659
Building Code: Restrictions in Fire Districts	673
Burial Association Commissioner: Opinions to	523
C	
Cape Hatteras Seashore Commissioner: Federal Income Tax Deductions	513
Cemeteries: Removal of Graves by Church Authorities; Consent of Next of Kin	674
Charitable and Penal Institutions: Supervision	509
Charitable Organizations: Income Tax	600
Children and Minors:	
A.B.C. Act	634
Adoption:	
Child Born in Wedlock but Alleged to be Illegitimate	476
Consent of Insane Mother	504
Father's Failure to Consent; Abandonment	500
Juvenile Courts; Jurisdiction	503
Surrender of Child	484
Surviving Petitioner	485
Birth Certificate for Adopted Child	367
Change of Names of Illegitimate Children on Birth Certificates	374
Child Born During Separation of Parents; Birth Certificate	382
Child of Bigamous Marriage; Vital Statistics	377
Consent Addressed to Clerk of Court of County other than that of Adoption	483
Custody of Child upon Dismissal of Adoption Proceeding	486
Dependent Children; Appropriation Act of 1947	480
Effect of Instrument Transferring Custody or Guardianship	488
Interstate Transfer of Children for Adoption	485

Jurisdiction of Child Pending Appeal in Juvenile Court	481
Juvenile Courts; Jurisdiction	479
Legal Settlement	492, 632
Legitimation of Foreign Born Child	363
Natural Guardians; Grandparents	489
Veterans; Educational Advantages	559
Veterans; Guardians	684
Veterans; Wills	559
Ward of Court in Adoption Proceeding	487
Chiropodists; Physician; Administration of Narcotics	614
Chiropactor; Charges of; Executors and Administrators	618
Christian Union Relief Society	523
Churches; Graves; Removing Remains of Deceased Persons	622
Circuses; License Tax	224
Cities and Towns; See Municipal Corporations	
Civil Actions:	
Motor Vehicle Laws; Service of Process on Non-residents	329
Process Tax; Confession of Judgment	688
Civil Actions Disposed of before Industrial Commission	6
Civil Actions Disposed of in District Court of U. S.	7
Civil Actions Disposed of in Superior Courts	5
Civil Actions Disposed of in Supreme Court of N. C.	7
Civil Actions Disposed of in U. S. Supreme Court	7
Civil Actions Pending before Industrial Commission	6
Civil Actions Pending before Interstate Commerce Commission	7
Civil Actions Pending in Superior Courts	5
Civil Actions Pending in Supreme Court of N. C.	7
Civil Actions Pending in U. S. Supreme Court	7
Civil Actions Pending in U. S. District Court of Appeals	7
Civil Actions Pending or Disposed of in Courts of N. C.	5
Civil Cases of Special Interest Summarized	30-36
Garrau Knitting Mills vs. Commissioner of Revenue, 228 N. C. 764	32
General Motors Corporation vs. Commissioner of Revenue	33
Gill vs. Singers Jewelers	31
N. C. vs. U. S. A., 325 U. S. 507	30
N. C. vs. A. C. L. R. R. Co., et al	34
Neshitt vs. Gill, 227 N. C. 174	34
Re: L. G. Squires Driver's License Suspension	36
Univ. of N. C. vs. Guerrant, Trustee	36
Univ. of N. C. vs. Heirs of Donald Steffee	36
Univ. of N. C. vs. Heirs of Joseph Futch	36
Univ. of N. C. vs. Raymond Marshall	36
Walter Miles, et al vs. State Board of Education	35
Clerk of Superior Court:	
Commissions; Funds Received by Virtue of Office	681
Consent in Adoption Proceedings	483
Deputy; Authority to Take Acknowledgments and Pass Upon Probates	648
Estates of Missing Persons; Jurisdiction	667
Fees; Subpoenas Issued by Attorney	664
Safety Deposit Box Opening	658
Vacancies; Terms for Which Vacancies Filled	701
Cleveland County Act	71
Cleveland County: Assumption of Elizabeth District School Bonds	61
Codification, Division of	18
Codification and Legislative Drafting of Statutes, Division of	18
Commission for the Blind; Opinions to	571-579
Commissioner of Agriculture; Opinions to	255-272
Commissioner of Barks; Opinions to	402-413
Commissioner of Labor; Opinions to	318-321
Commissioner of Public Trust; Contracting for Own Benefit	63
Commissioner of Revenue; Opinions to	87-254
Compacts with other States; Governor's Authority	38
Confederate Women's Home; Eligibility	274
Confederate Veterans; Burial Expenses	51
Confederate Widows; Income Tax Exemptions	114
Conservation and Development; Opinions to Department of	513-516
Constables:	
A.B.C. Laws	632
Deputies; Appointment of	680
Constitution; Fines and Forfeitures to School Fund	695
Constitutional Law; Necessary Expenses; Repair of Courthouse	477
Contractors; License; Owner Acting as Superintendent	654
Contracts:	
Sewage Disposal	276
State; Failure of Bidder to Comply with Bid	588
Co-operative Associations:	
Foreign; Domestication	43
Income Tax; Exemptions	250
Co-operative Organizations; Credit Unions	257
Coroners:	
Highway Accidents; Removal of Body by Officers	660
Inquisition; Right of Accused to Counsel	624

Mileage	671
Service of Process When Sheriff is a Party	703
Corporations:	
Corporation as an Incorporator	310
Dissolution	655
Foreign; Federal Contracts; Income Tax	87
First Organization Meeting	628
Foreign; "Doing Business"	46
Foreign; Income Tax	222
Foreign; Income Tax; "Doing Business"	172, 225
Foreign; Income Tax; Income from Partnership in Taxing State	174
Foreign; Income Tax; Subsidiary Corporations	658
Foreign; Operating through Independent Contractors; Income Tax	170
Gifts to Employees; Income Tax Deductions	131
Income Tax; Contributions to Welfare Association	187
Income Tax; Contributions to Welfare Trust for Employees	195
Income Tax; Income from Out-of-State Branch	175
Income Tax; Situs	91
Non-Stock; Right to Create	665
Parent and Subsidiary; Income Tax Deductions	172
Practice of Law	646
Rights and Powers of Foreign Corporations	42
Selling Name; Good Will	47
Counties:	
A.B.C. Fund; Appropriations	674
Appropriations for Recreation Centers	619
Attorneys; Compensation for Appearing in Superior Court	648
Attorneys; Employment of	661
Beer and Wine Tax; Distribution	208
Bond Issue; Necessary Expenses	630
Bond Issues; Debt Limitations	619
Contribution to City's Vital Statistic Expense	376
Courthouse; Rental for Commercial Uses	684
District Hospital; County's Liability	677
Fiscal Control Laws; Surplus Funds	517
Garbage Collection	666
Health Center; Special Tax; Election	666
Health Department; Buildings; Acquisition	680
Hospital as a Necessary Expense	543
Hospital; Contracts for Construction	538
Hospitals; Use of Surplus A.B.C. Funds for Erection	702
Liability in Operation of Federal owned Trucks	380
Municipal Corporations; Abattoirs	637
Municipal Fire Departments; Contributions to	681
Poor Fund	679
Prisoners; Commutation of Sentence	638
Property; Sale of	623
Public Liability and Property Damage Insurance	673
Relief of Poor; Tax Levy	502
School Bonds; Necessary Expense; Debt Limitation	686
Special Tax for Health Department	621
Taxation; Airports	629
Taxation; Exemption; Poor and Infirm	622
Taxation; Fair Ground Properties	629
Taxation; Land Lying in More than One County	646
Taxation; Penalties	684
Tax Collection; Settlement	638
Tax Foreclosure Cancels Tax Lien	654
Warranty Deeds	670
Welfare Department; Salaries of Employees	695
County and Municipal Finance Act; Hospitals; Special Elections	690
County Board of Education:	
De Facto Member; Per Diem; Expenses	66
Gasoline Tax Exemptions	201
Member Delegating Authority	664
County Board of Health; Plumbing and Heating; Authority of Board	530
County Commissioner; Contracting for Own Benefit	641
County Officers; Garnishment of Salary	92
County Surveyor; Eligibility to Hold Office	612
Courthouse; Repairs; Necessary Expenses	477
Court Martial; National Guard	316
Courts:	
County Criminal Court; Issuance of Process	698
Juvenile Courts; Criminal Law	479
Juvenile Courts; Employees; Merit System Act	468
Juvenile Court; Jurisdiction	503
Juvenile Courts; Jurisdiction of Child Pending Appeal	481
Mayor's Court; Jurisdiction	686
Motor Vehicles; Jurisdiction	324
Recorder's Court; Who May Issue Warrants	670
Recorder's Court, Henderson County	449

Credit Unions:

Agricultural Co-operative Associations	257
Libel and Slander	262
Criminal and Civil Statistics, Division of	17
(See also tables at end of Report)	

Criminal Cases Argued by Attorney General and Associates Before

Supreme Court of N. C.	8-15
Criminal Cases of Special Interest Listed and Summarized	23-30

Big Apple Case	24
In re Wright, 228 N. C. 301 and 228 N. C. 584	32
State vs. Anderson, 228 N. C. 720	29
State vs. Baker, 229 N. C. 73	29
State vs. Bishop, 228 N. C. 371	23
State vs. Blanton, 227 N. C. 517	25
State vs. Brooks, Brown and Munn, 228 N. C. 65	26
State vs. Davenport (Big Apple Case), 227 N. C. 475	24
State vs. Ewing, 227 N. C. 535	25
State vs. Gardner, 226 N. C. 311	25
State vs. Gardner, 227 N. C. 37	25
State vs. Hammond, 229 N. C. 108	24
State vs. Law and Kelly, 227 N. C. 103 and 228 N. C. 443	28
State vs. Litteral and Bell, 227 N. C. 527	28
State vs. Lovelace, 229 N. C. 186	27
State vs. Phillips, 227 N. C. 277	24
State vs. Warren, 227 N. C. 380	27
State vs. Whitaker, DeBruhl, et als, 228 N. C. 352	23

Criminal Law:

Abandonment; Children by Mother	643
Abandonment; Failure to Support Minor Children	676
Aeronautics; Dangerous Flying	626
Commutation of Imprisonment to Fine	508
Concealed Weapons	628, 643
Concealed Weapons; Confiscation; Return to Innocent Owner	683
Concealed Weapon; Defective Pistol	640
Costs; Liability of Counties for	633
Drunken Driving; Two Offenses in One Day	346
Dueling	655
Erroneous Conviction; Compensation	507
Evidence; Accusation Made in Presence of Defendant	680
Explosives	639
Horse-Drawn Vehicle; Driving under the Influence of Intoxicating Liquor	669
Indecent Language	646
Intoxicated Drivers of Horse-Drawn Vehicles	634
Intoxicating Beverages; Federal License as Prima Facie Evidence	688
Judgments and Sentences; Cumulative and Concurrent	352, 353 and 355
Juvenile Courts; Jurisdiction	479
Larceny; Livestock	506
Livestock; Pursuing with Intent to Steal	506
Motor Vehicles; Driving under Influence of Intoxicating Beverages;	
Aiding and Abetting	687
Motor Vehicles; Operation during License Suspension; Effect of Acquittal	343
Motor Vehicle Violations; Jurisdiction	324
Nol Pros	651
Obstruction of Streams by Felling Trees	515
Penalty for Fishing in Closed Season	556
Probation; Completion of Sentence	580
Public Nuisance; Padlocking of Private Dwelling	690
Taxicab Fare	694
Weapons; Sale of; Purchaser Entitled to Retain Permit	690
Criminal Procedure; Warrants; Who May Issue	632
Currituck County Game Commission; Contributions to	557

D

Department of Agriculture:

Fertilizer Act of 1947	260
Opinions to	255-272
Rules and Regulations; Tobacco Curers	257
Weights and Measures	271
Department of Archives and History; Opinions to	510, 511
Department of Conservation and Development	21
Authority to Subpoena Witnesses	515
License Fees	273
Opinions to	513-516
State Insurance Coverage	303
Department of Labor:	
Boiler Inspection Act	320
Maximum Hour Law; Exemptions	318
Opinions to	318-321
Department of Motor Vehicles; Opinions to	322-350
Dependent Children; Appropriations Act of 1947	480
Deputy Game Protectors	516
Descent and Distribution; Husband Dying Intestate Leaving Wife and Children	662

Detectives:

License Tax	662
Private; Age	638
Private; Carrying Concealed Weapons	694
Private; License Requirements	638
Private; Power to Arrest; Right to Carry Weapons	627
Division of Criminal and Civil Statistics	17
(See also tables at end of Report)	
Division of Legislative Drafting and Codification of Statutes	18
Division of Purchase and Contract:	
N. C. Symphony Society; Purchase of Supplies under State Contract	554
Opinions to	554-555
State Licensing Board for Contractors	609
Divorce:	
Grounds for	634
Insanity as Grounds	628
Parent and Child	375
Residence Requirements	656
Resumption of Maiden Name	667
Double Office Holding:	
A.B.C. Officer and Chief of Police	624
Business Manager of State Hospital; City Councilman	590
Chairman Local Precinct Committee; City Commissioner; Member	
County Board of Education; Member County Party Executive Committee;	
Member Local School Committee; Mayor	86
Chief of Police; Town Constable; Tax Collector	619
City Councilman; Business Manager of State Hospital	590
Constitutional Prohibition; Exemptions	631
County Accountant	66
County School Superintendent	66
Membership on Recreation Commission	553
Public Officer Serving on Board of Publicly Owned Hospital	541
Tobacco Specialist	255
Dower: Inheritance Tax; Ante-nuptial Agreement	240

E

E.R.A.: Surplus Funds	510
Eastern Carolina Teachers College: See State Teachers College	
Education, State Board: Opinions to	385-401
Education: See Schools	
Elections:	
A.B.C. Election; Petition; Public Record	657
A.B.C. Election: Time for Holding	640
A.B.C. Stores; Signatures on Petition	620
Ballot Placed in Wrong Box	616
Beer and Wine; Municipal Corporations	662
Bond Elections; Hospital Purposes	679
Forging Elector's Name on Registration Book	630
Independent Candidates	629
New Political Party; Placing Names on Ballots	584
Officials; Compensation	620
Public Officers as Election Officials	699
Registration Book; Error on as Affecting Eligibility of Elector	657
Registration of Voters in Second Primary	583
School; Vote Necessary to Issue Bonds	670
School Bond Election; Special Registration	82
Special; Absentee Ballots	633
Special; Absentee Voting	649
Special; Registration Period; Challenge Day	627
Special Registrations	681
Supplemental School Tax; Procedure in Holding	81
Voters; Persons Becoming Qualified Between Primary and Election	700
Voters; Qualification of	638
Emergency Bonus 1946 and 1947	50
Emigrant Agents: License Tax	186
Employment Security Commission:	
Employment Service Division; Appropriations, 1945-47; Emergency Bonus	441
Employment Service Division; Federal Transfer of Functions; Merit System	426
Opinions to	423-448
Records; Department of Archives and History	425
Sheriff's Process Fees	447
Teachers' and State Employees' Retirement System	444
Eminent Domain: Judgment of Court in Lieu of Deed	633
Engineers: License in Firm Name	663
Escheats: Insurance Coverage	302
Evidence:	
Intoxicating Beverages; Federal License as Prima Facie Evidence	688
Rules of; Probation Commission	581
Executors and Administrators:	
Annual Report After Caveat Filed	618
Charges for Publication of Notice	622

Debts; Charges of Chiropractor	618
Final Account; Failure to File; Contempt	667
Publication of Notice to Creditors; Final Settlement	687
Extradition:	
Cost in Misdemeanor Cases	627
Extraditable Offenses; Uniform Law	677

F

Farm Products: Definition; Marketing and Branding	255
F.B.I.: Authority to Examine Absentee Ballots	583
Federal Income Tax: Deductions; Cape Hatteras Seashore Commission	513
Federal Savings and Loan Association: Sales Tax	117
Federal Wage Stabilization Act: Income Tax Deductions	207
Fees Transmitted to State Treasurer	15
Fertilizer Act of 1947: "Branding" and Tags	260
Fiduciaries: Income Tax; Non-Resident Beneficiary of Resident Trust	231
Financial Responsibility Act: See Motor Vehicles	
Fines and Forfeitures:	
Application to School Purposes	67
Schools; Transfer	67
School Supplement; Application of Funds	74
Firemen's Relief Fund: Scope of Coverage	314
Fire Protection: "Hotels and Buildings of Like Occupancy"	664
Fiscal Control Laws: Surplus Funds	517
Fish Laws:	
Justice of the Peace; Criminal Jurisdiction	690
Private Ponds	628
Swain County; Licenses	558
Violations of; Justice of the Peace	556
Food, Drug and Cosmetic Act of N. C.	268
Foreclosures: Procedure; Special Assessments	692
Forest Wardens	516
Franchises:	
Bus Companies	287
Motor Bus Carriers; Municipal Franchises	289
Fraternal Orders: Insurance; Fees	292
Freezer Lockers: Inspection	366

G

Gambling:	
Bingo	620
"Flicker Crowns"	700
Lottery Laws; "Jack Pot Night"	698
Lottery Laws; Sales Ticket; Lucky Number	698
Punch Boards; Slot Machines; Confiscation	669
Slot Machines	699
Slot Machines; Pin Ball Machines	646 and 673
Slot Machines; Pin Ball Machines; Varying Scores	646 and 673
Game Laws:	
Currituck County Game Commission; Contributions to	557
Forest Warden Serving as Deputy Game Protector	516
Illegal Devices	647
Illegal Devices; Confiscation	678
Licenses; By Whom Required	641
Revocation of License	639
Garnishment: Salaries of County Officers	92
General Assembly: Vacancies in Membership; Manner of Filling	696, 697
Gordon Gray Act: Senate Bill No. 353	607
Governor:	
Appointment of Boards and Commissions	38
Authority to Appoint Special Police; Merchants' Patrol	40
Commutation of Imprisonment to Fine	508
Compacts with Other States; Legislative Approval	38
Opinions to	37-41
Grants: O'Neal and Fulcher Entries	40
Greater University:	
Opinions to	414-422
(See University of N. C.)	
Great Smoky Mountains National Park: Jurisdiction	513
Greensboro Coliseum Memorial: Contributions to	301
Guardians:	
Corporations; Bond Requirements	652
Natural Guardians; Grandparents; Consent	489
Health:	
Abattoirs	358
Abattoirs and Meat Markets; Inspection	366
Administration; Federal Contracts	358
Authority of State Board to Contribute to Municipal Service Expense	362

H

Authority of State Board to Make Certain Sanitary Inspections	365
Collection and Disposal of Garbage	377
District Board of Health; Administration	360
District Health Departments; Rules and Regulations	372
Municipal Corporations; Injunction to Remove Nuisance	616
Municipal Watersheds; Inspection	375
Plumbing and Heating; Ordinances; County Board of Health	530
Prisons and Prisoners; Inspection Authority	378
Sanitary Districts; Regulations	371
Sewage Connections	381
State Board; Opinions to	357-384
State Grant of Funds to Local Health Departments; Contracts	383
Veneral Disease; Authority to Treat and Control Patients	378
Veneral Diseases; Service of Process on Patients	373
Vital Statistics; Fees	362
Watersheds; Authority of Inspectors Where Watershed Extends Into More Than One County	687
Henderson County: Recorder's Court	449
Hospital Care Association: Insurance	308
Hospital Care Commission: Appropriations; Availability	537
Hospitals: Contributions to Private Hospitals; Necessary Expense	471
Eligibility to Receive Contributions under Hospital Care Program	532, 533 and 535
Hotels: License Tax; Bent Creek Ranch	218
Hot Pursuit: A.B.C. Act; Police Officers; Constables	626

I

Incompetents: See Insane Persons and Incompetents	
Ilmenite Lease: Agreements; Amendments	514
Indians: Eastern Band of Cherokee; School Attendance Status	77
Property of; Supplemental School Tax	82
Indians of Robeson County: Rights and Liabilities in Respect to Supplemental School Tax	57
Industrial Commission: Opinions to	448-449
Sales Tax on Material Paid for Out of Second Injury Fund	448
Industrial Commission and Workmen's Compensation	22
Inebriates: Commitment to State Hospitals	675
Commitment to State Hospitals; Appeal	652
Insane Persons and Incompetents: Consent of Insane Mother in Adoption Proceedings	504
Inquisition of Lunacy; Costs	677
Insurance: Agents; Municipal Privilege Tax	302
Approval of Forms	292
Certificates of Incorporation; Corporation as Incorporator	310
Contracts for Ambulance Service	304
Farmers' Mutual Fire Insurance Association	301
Fire; State Property; Replacement	691
Firemen's Relief Fund	314
Fire Protection; Volunteer Departments	313
Fraternal Societies; Fees	292
Fred W. Greene; Eligibility as Agent	312
"Home Security Plan Certificate"	308
Hospital Care Association	308
Hotels and Buildings of Like Occupancy	305
Inheritance Taxation	205
Inheritance Tax; Change of Beneficiary	149
Inheritance Tax; Resident Insured; Non-resident Beneficiary	159
Liability; State Employees; Torts	590
Minor Servicemen and Wives; G. I. Bill of Rights	290
Premium Tax	293, 297
Repair and Replacement Cost	304
Standard Fire Policy	309
State Employees Liability	665
State Owned Property	314
State Property Fire Insurance; N. C. Sanatorium	592
State Property Insurance Fund	302
State Self Insurance; Fire Coverage	303
Title Insurance	293
Insurance Commissioner: Opinions to	291-315
Insurance Company of North America: Automatic Re-instatement	296
Intoxicating Beverages: A.B.C. Act; Disposition of Funds	624
Minors	634
Prohibition Law Violators	659
Statute of Limitations	121
A.B.C. Stores; Daily Deposit Law; Bond	671

A.B.C. Stores; Elections; Time for Holding	702
A.B.C. Stores; Near Churches or Schoolhouses	683
Beer; Crown Tax; Refunds	242
Beer; Sale on Sunday; Revocation of License	683
Beer and Wine:	
Excise Tax; Expenditure by Counties	691
Illegal Sale Violation of Prohibition Laws	694
License Requisites	248
Licenses; Residence Qualifications	685
Municipal License Must be Granted Before County License	669
Retail License Not Transferable	692
Retail License Requirements	678
Revocation of Licenses	616
Sale at American Legion Post	660
Sale on Election Day	617
Tax; Distribution	208, 212
Taxes; Application to Supplement School Funds	68, 70
Confiscation and Disposition of Illegal Liquors	693
Funds from Sale of Confiscated Liquors; Disposition	699
Motor Vehicle Confiscated for Transporting	657
Possession in Wet Counties; Transportation	631
Private Sale of Whiskey in Clubs	661
Revocation of License to Sell	173
Special Election; Counties	657
Transportation; Jurisdiction	666
Transportation for Sale; Two or More Counties; Venue	665
J	
Jessie Ella Parkinson Estate:	
Inheritance Tax Computation	161
Inheritance Tax; Power of Appointment	153
Judicial Sales: O.P.A. Regulations	620
Jurors:	
Exemptions	700
Fees; Mileage	649
Fees; Right of County Officers to Receive	637
Jury Tax	664
Workmen's Compensation	695
Justices of the Peace:	
Accountings for Funds Received	675
Arrests; Delegation of Authority to Make	679
Authority to Delegate Private Citizen to Serve Process or Make Arrest	649
Bond	642
Carrying Concealed Weapon	698
Commission for Law Enforcement Officers' Fund	658
Fish Laws	556
Fish Laws; Criminal Jurisdiction	690
Jurisdiction; Speeding	626
Jurisdiction; Reckless Driving or Speeding	617
Service of Warrant in Another County; Necessity of Endorsement	671
Vacancies	667
Juvenile Courts:	
Criminal Law; Jurisdiction	479
Discharge from State Institutions	609
Jurisdiction	503
Jurisdiction; Motor Vehicles Law	702
Jurisdiction of Child Pending Appeal	481
Jurisdiction over Adults	652
Order Authorizing Consent by County Superintendent of Welfare in Adoption Proceeding	495
K	
Kellex Corporation: Sales and Use Tax	150
L	
Labor, Commissioner of: Opinions to	318-321
Lanham Act	43
Larceny; Pursuing Livestock with Intent to Steal	506
Laundries, Self-Service: License Tax	170
Law Enforcement Benefit and Retirement Fund: Deputy Sheriffs Status	51
Law Enforcement Officers' Benefit and Retirement Fund:	
Membership; Eligibility	49
Municipal Corporation	625
Process Tax	658
Legal Advertisements:	
Bids on Publication of Tax Notices	669
Newspaper Qualifications	676
Legal Publications	520

Legal Settlement:	
Derivaty; Married Women; Children	492
State Hospital	590
Legislative Drafting and Codification of Statutes	18
Letter of Transmittal	4
Libel and Slander; Credit Unions	262
Library Commission; Opinions to	522
Linseed Oil; Inspection Tax	265
Livestock; Importation of Cattle	260
Local Government Act; Mountain Retreat Association	518
Local Government Commission; Opinions to	517-521
Local Governmental Employees' Retirement System:	462
Elective Officers; Compulsory Retirement	464
Registration of Bonds	53
Local Governmental Retirement System; Coverage; Employees of County Library	453
Local Improvements; Application of Assessments	517
Log Rule; International ¼-Inch	417, 665
Lotteries; See Gambling	
Lucile Way Wyrick Estate; Inheritance Tax	110
M	
Magistrates; Territorial Jurisdiction	646
Maps; For Whom Recorded; Alterations	689
Markets; Livestock	260
Marriage:	
Capacity to Contract	678
Certificates; Where Recorded	645
In a Foreign State; License to Remarry in N. C.	668
Inheritance Tax; Ante-Nuptial Agreements	240
Issuance of License	701
License; Duplication of Lost License	619
License; Fees	656
Residence; Age; Consent; Special License	681
Solemnization	633
Vital Statistics; Child of Bigamous Marriage	377
Vital Statistics; Foreign Marriages	363
Married Women:	
Elimination of Examination	615
Legal Name	549
Legal Settlement	492
Mayor's Court:	
Authority to Delegate Judicial Powers to J. P.	635
Jurisdiction	696
Meat Markets; Inspection	366
Medical Care Commission:	
Advisory Council; Expenses	537
Application of Public Contracts Act to Units Receiving Grants-in-aid	545
Appropriations for Local Hospitals	275
Authority of County, City or Town to Contribute to Non-Profit Hospital	686
Double Office Holding; Public Officer Serving on Board of Publicly-Owned Hospital	541
Merit System:	
Aliens	357
Employment Security Commission	427
Juvenile Court Employees	468
On-the-Job Training Benefits	524
Plan of Compensation	524
Veterans' Preference	526
Merit System Council; Opinions to	524-527
Minors; See Children	
Miscellaneous Opinions	600-614
Missing Persons; Estates of; Clerks of Superior Court; Jurisdiction	667
Morrison Training School; Contracts for Sewage Disposal	276
Mortgages; Chattel Mortgage on Aircraft	621
Motor Advertisers; License Tax; Sec. 151½ Rev. Act	116
Motor Carriers' Act of 1947; Maximum Hour Law	318
Motor Vehicles:	
Ambulances; Rules of the Road	339
Chauffeurs; Licenses	645
Chauffeurs; License; Employee of Company Delivering for Company	675
Civil Actions; Service of Process on Non-Residents	329
Confiscated for Transporting Liquor; Sale of	657
Contract Haulers; "Primary Markets"	336
Courts; Jurisdiction	324
Dealers Having No Established Places of Business	337
Dealer's License Plates	626
Defective Brakes	656
Driver's License; Drunken Driving	346
Driver's Licenses; Notations on Licenses	693
Driver's License; Operating During Suspension	343
Driver's License; Suspension; Revocation	328

Driving Under Influence of Intox. Bev.; Aiding and Abetting	687
Duty to Stop in Case of Accident	701
Farm Tractors	663
Financial Responsibility Act:	
Bankruptcy	698
Construction	331
Driver Not Owning Vehicle	701
Effective Date	674
Fleet Owners; Sales Act	237
"For Hire" Carriers	330
Franchise Haulers:	345, 347
Gross Revenue Tax	322, 345
Gross Revenue Tax; Penalties	347
Gross Revenue Tax:	326
Franchise Haulers	359
Penalties	349
Inspection Act; Application to Federal Government Owned Vehicles	382
Liens; Registration and Recordation	645
Maximum Speed Limits	338
Motorcycle Clubs; Tax Exemption	243
Parking in Front of Theaters	674
Passing on the Right; Local Regulations	702
Reckless Driving; Speeding; Jurisdiction of Mayor or Justice of the Peace	617
Red Lights on Front of Private Vehicles	346
Registration; Chattel Mortgage	665
Registration Plates; Comity	676
Revocation of Driver's License; Conviction in another State	660
Revocation of Driver's License; Reinstatement in Case of Pardon	648
Revocation of Driver's License; Suspended Sentence	627
Sales & Use Tax; Chassis & Bodies	194
School Buses; Rules of the Road	339
Search of Vehicle Without Search Warrant	703
Sirens and Red Lights on Front of Privately-owned Vehicles	689
Speeding in Excess of 75 M.P.H.; Reckless Driving; Penalties	694
Speeding; Jurisdiction of Justice of the Peace	626
Speeding; Reckless Driving; Punishment	691
Speed; Municipal Ordinances	334
Storage Liens	643
Title Registration; Fraud	341
Certificate of Title; Transfer of Title	702
Truck Act of 1947; Contract Carriers	348
U-Drive it Trucks	289
Uniform Driver's License Act; Motor-Propelled Bicycles	624
U. of N.C. Windshield Stickers	420
Violation of Laws; Reports	663
Mountain Retreat Association; Local Government Act	518
Motion Picture Films; Income Tax	222
Municipal Corporations:	
Athletic Field; Necessary Expense	641
Beer and Wine Tax; Distribution	208, 212
Bonds, Statute of Limitations	642
Building Regulations	636
City Hall; Authority to Mortgage	617
Contributions to Chamber of Commerce	632
Contributions to Music Clubs	634
Counties; Abattoirs	637
County Contribution to City's Vital Statistic expense	376
Debt Limitation; Bonds Issued During Current Year	668
Dissolution; Repeal of Charter	636
Elections; Beer and Wine	662
Elections; Residence Requirements	658, 678
Employees; Group Fire Insurance Premiums	685
Escalator Clauses in Bids	685
Facilities in Newly Annexed Territory	650
Fire Departments; Residence Requirements as to Chief and Members	671
Fireworks; Sale of	630
Fiscal Control Laws; Surplus Funds	517
Franchises to Bus Companies	287
Gasoline Storage Tanks; Zoning Ordinances; Nuisances	655
General Expense Tax Rate	698
Health; Pollution of Water	623
Hospital as a Necessary Expense	543
Hospitals; Contracts for Construction	538
Injunction to Remove Nuisance	616
Insurance Agents; License Tax	302
Liability for Tort of Police Officer	615
Liability of School Unit for Local Improvement Assessment	85
Local Improvement Assessments; Application	517
Mayor; Probate of Instruments	699
Mayor; Salary	674
Motor Bus Carriers; Franchise	289
Motor Vehicles; Speed Limits	334

National Guard; Contributions to	661
New Enterprises; Exempting from Taxation	653
Ordinances;	
Children of School Age in Moving Picture Houses During School Hours	668
Motor Vehicles Noises	636
Opening and Closing Hours for Business on Sunday	685
Prohibiting Sawmills Within Corporate Limits	677
Storage and Sale of Fuels and Explosives	688
Upkeep of Private Premises	654
Parking Meter Revenue; Application	668
Parking Meters in Towns of Less than 20,000 Population	615
Police Officers; As Collecting Agency for Municipality	634
Extension of Power by Ordinance	622
Jurisdiction and Powers	633
Residence Requirements	621
Torts	643
Privilege Tax; Jewelers	663
Public Contracts; Limit on Contracts Without Public Bidding	676
Public Nuisances; Health	645
Radio Stations; Taxation	666
Railroad Crossing; Ordinance Regulating Use of Streets	672
Railroad Intersections; Right to Require Maintenance of	699
Railway Right of Way; Local Improvements; Assessments	692
Recreational Projects; Revenue From Non-Tax Sources	654
Reorganization of Lapsed Government	615
Service Stations; License Taxes	639
Sewage Connections	381
Sewage Outlet for Industrial Plants	631
Sewer Assessments; Refunds	697
Sidewalks; Use of; Parking Lots	635
State Board of Health; Morris Field, Charlotte	362
State School Property; No Authority to Condemn	619
State Speed Law; Intersections	676
Streets; See Streets	
Street Assessments	636
Liability of Public Property for	641
Liens	645
School Property	658
State Owned Property	587
Street Improvement Bonds; Period over which Bonds May Run	623
Taxation; Discrimination on Basis of Residence	655
Interest on Installments; Local Improvements	682
Manufacturing Enterprises; Limitations	681
Privilege Tax; Chain Banks; Theaters	644
Of Industrial Banks	410
Taxes; Application of	640
Taxicabs; Stands	660
Tax Rate Limitations	699
Tax Rates; Differentials	650
Town Clock; Necessary Expense	648
Vacancy on Town Board	631
Warranty Deed	637
Water; Out-of-Town Customers	642
Watershed Inspection	375
Water Tanks; Necessary Expense	649
Water Works and Sewer; Necessary Expense	653
Mutual and Co-operative Associations; Franchise Tax	232
Mutual Groceries; Franchise Tax; Income Tax	244

N

Names:	
Disclosure of; Blind Person Receiving Aid	575
Legal Name of Married Woman	549
Resumption of Maiden Name after Divorce	667
National Banks; Sales Tax; Exemptions	88
National Guard; Courts Martial	316
Donations of Land and Property	686
Necessary Expense; Contributions to Private Hospital	471
Report of Court House Constitutional Law	477
Nissen Wagon Company; Corporate Name; Good Will	47
N. C. Bankers' Association; Eligibility of Executive Secretary as Insurance Agent	312
North Carolina Burial Association Commission:	
Jurisdiction	523
Limit on Expenditures	276
N. C. Charter of 1663	277
N. C. Council of Churches; License under Chapter 572, Session Laws of 1947	496
N. C. Medical Care Commission:	
Certification of Indigency; County Welfare Officers	536
Opinions to	532-547
N. C. Pharmaceutical Association:	
Powers in Designating Member of Board of Pharmacy	567

N. C. Sanatoriums:	
Permanent Improvements Act of 1947	591
Prevention of Spread of Tuberculosis	592
State Property Fire Insurance	592
N. C. Symphony Orchestra: Retirement System	461
N. C. Symphony Society: Purchase of Supplies under State Contract	554
N. C. Wildlife Resources Commission	22
Notaries Public:	
Administration of Oaths and Affirmations	661
Date of Expiration of Appointment	692
Date of Qualification	678
Eligibility; Powers	37
Fees	38
Jurisdiction	642
Legal Services	642
Marriage Ceremony	650
Minors	631
Officer of Bank as Notary	411
Powers	627

O

O.P.A.: Applicable to Sales by State	554
Overcharges; Income Tax Deductions	94
Regulations; Judicial Sales	620
Obscene or Immoral Pictures: Criminal Law	696
Office Digest of Opinions	615-704
Officers: Elective; Compulsory Retirement	464
Oleomargarine: Food & Drug Laws	263
Serving in State Institutions	589
Old Age Assistance: Appropriations Act of 1947	480
O'Neal & Fulcher Entries	42
Optometry Act: Separability Clause	612
Orphanage: Unauthorized Removal of Orphans	672
Oysters: Taking From Private Beds	691

P

Parent and Child: Divorce; Effect	375
Liability of Father to Support Child	701
Pardons: Right of Governor to Commute Imprisonment to Fine	508
Paroles Commission; Opinions to	506, 508
Partnership: Family; Income Tax	169
Foreign; Income Tax	219
Income Tax	104
Peace Officers' Pension Fund; Income Tax; Deductions	214
Pension Funds; Income Tax; Deductions	214
Permanent Improvements Act of 1947; N. C. Sanatoriums	591
Pharmacy: Comity	564
Requirements to Become Licensed as a Pharmacist	562, 564
Phonettes: License Tax	120
Physicians: Revocation of License	549
Physicians and Surgeons:	
Duty to Report Deaths from Violent or Accidental Causes	703
Meaning of Word "Physician" in Workmen's Compensation Law	614
Revocation of License; Conviction of Felony	647
Planning Boards: State; City and County	601
Plumbing and Heating:	
Examination; Salaried Employees	689
Licensing Act; Plumbers Employed by Education Institution	658
Ordinances; County Board of Health	530
Political Party: New; Placing Names on Ballots	584
Pool Rooms: Licenses; Issuance and Revocation	644
Postal Laws; Mailing Statement of Account on Post Card	654
Prefabricated Houses: Sales & Use Taxes; Maximum Unit Tax	229
Prisoners:	
Counties; Commutation of Sentence	638
Counties; Liability for Injury to Prisoner	644
Prisons: Sanitation; Inspection Authority	378
Probates: Illegible Signature of Probating Officer	656
Probation: Completion of Sentence; Criminal Law	580
Probation Commission: Compacts with Other States	581
Opinions to	580-582
Revocation Hearing; Rules of Evidence	581
Process Tax: Law Enforcement Officers' Fund	658
Public Accountants:	
Licenses Taxes	682
Use of Title "Accountants"	560
Public Contracts' Act: Application to Units Receiving Grants-in-Aid from Medical Care Commission	545

Public Health: See Health	
Public Libraries: Joint Library; Trustees	522
Public Officers: Contracting with Themselves	677
Public Records: Petition for A.B.C. Election	697
Public Solicitation of Alms	469
Public Welfare: Cost of Administration; County Participation	665
Public Welfare, Board of; Opinions to	467-506

R

Rabies Act: Appointment and Qualifications of Rabies Inspector	652
Railroads: Overcharges of Intrastate Passenger Fares	279, 286
Recorder's Court:	
Henderson County	582
Jury Fees	625
Jury Trial; Appeal	637
Peace Warrant	637
Recreation Commission:	
Double Office Holding; Membership on Commission	553
Opinions to	553
Register of Deeds:	
Birth Certificate of Adopted Child; Procedure	367
Correction of Errors	655
Temporary Index	629
Retirement System:	
Accounting System; Separation of Funds	465
Definition of "Year"; Retirement at 65; Retention Thereafter	451
Elected Officers; Compulsory Retirement	464
Electric Membership Corporation Membership	458
"Employer" Under the Act; Agencies of the State	461
G.S. 135-14 Interpreted	464
Local Governmental Retirement System	462
Local Governmental Retirement System; Coverage	453
Member in Federal Service	456
Member Over 65; 20 Year Retirement	457
N. C. Symphony Orchestra	461
Notice by Employer of Member Over 65	450
Opinions to	450-466
Prior Service; Five Year Basic Period	458
Prior Service Eligibility	453
Twenty-Years Service Retirement	459
Revenue Department and Motor Vehicle Department:	
Assignment of Assistant Attorney General	17
Revisor of Statutes	18
Rivers and Streams; Obstruction by Felling Trees	515
R.E.A.:	
Electric Membership Corporation; Right to Condemn Property	551
Electric Membership Corporation; Serving Out-of-State Communities	551
Rural Electrification Authority:	
Opinions to	551-552
Taxation of Property	622

S

Salvation Army: Solicitation of Alms	472
Sanitary Districts:	
Disposal of Garbage	377
Regulations; Enforcements	371
Schools:	
Ad Valorem Taxes; Penalties; Application	76
Athletic Events; Official Liability for Injuries in School Sponsored Events	680
Attendance; Age Limits	395
Attendance Age; Transfer from Out-of-State	395
Beer and Wine: Taxes under H.B. 1051	68, 70
Bible Teaching at Public Expense	651
Bond Elections; Special Registration	82
Bonds; County-Wide Basis; District Basis; Cleveland County Act	689
Bonds; Issuance of by School Districts	647
Bonds for Purchase of School Buses	394
Boundaries of School District; Changing Township Lines	685
Budget; Transfer of Items	61
Building Bonds; Time for Issuance	621
Buildings; Care and Inspection	644
Buildings; Cost of; City Administrative Unit Lying in More than One County	639
Buildings; Located on Site not Owned by School	398
Buildings; Necessity for; Site	640
Buildings; Repair of on Site with Reverter Clause	80
Buildings; Repair to; Title to Site	626
Buildings; Surplus Funds for Erecting	640
Buildings; Tax for Maintenance	616
Bus Drivers	648

Buses; Children Residing Within Mile and a Half of School	635
Buses; Self-Insurance Act	385
Buses; Use of	397
Capital Outlay	62
Capital Outlay; County Commissioners Fix Budget	703
Capital Outlay Funds	396
Cleveland County; Assumption of Elizabeth District Bonds	61
Cleveland County Act	71
Committeeman may not Teach in Public-Supported School	392
Committeemen Serving as Teacher	77
Compensation Insurance on Employees of Lunchroom	390
Compulsory Attendance Law	650
Compulsory Attendance Law; Age Limits	395
County Board of Education; De Facto Member; Per Diem; Expenses	66
County Finance Act	394
County Superintendent; Election	650
District Bonds; Assumption by Vote of People	60
District Committeeman; Removal	79
Double Office Holding; County Superintendent and County Accountant	66
Double Office Holding; Examples	86
Eastern Band of Cherokee; Attendance Status	77
Emergency Bonus; Absence of Teacher	392
Extension of City Administrative Unit Boundaries	399
Fairmont District Supplemental Tax; Indians' Participation	57
Funds from Fines, Forfeitures, etc.; Transfer	67
G. S., Articles 23, 24 and 26 of Chapter 115; Partial Repeal	59
Insurance; Member of Board of Trustees Furnishing Insurance on School Property	63
Lease of Property to Civic Organization	84
Liability of Authorities for Injuries on Playgrounds	399
Liability of School Unit for Municipal Assessment for Local Improvements	85
Lunchrooms; Compensation Insurance on Employees	390
Municipal Corporations; Opening and Closing Streets	80
Music; Teaching After School Hours; Use of School Building	682
Parliamentary Procedure; Polk County Schools	396
Principal on Leave of Absence; Salary	394
Principal's Salary while Serving in General Assembly	391
Private Schools; Solicitors	72
Procedure in Holding Supplemental Tax Election	81
Pupils; Attendance in District of Residence	58, 74, 385
Pupils; Attendance Law	65, 75, 700
Pupils; Grade in which Children to be Placed	672
Pupils; Insurance on Children on Buses	675
Pupils; Liability for Children Hurt on School Ground	78
Pupils; Marriage as Grounds for Expulsion	78
Pupils; Mentally Defective	642
Pupils; Smoking	646
Pupils; Transportation of Children to Athletic Events; Liability for Injury	69
Pupils; Tuition of Out-of-District Pupils	67
Purchase of Textbooks; Procedure	58
Reidsville City Administrative Unit; Use of School Stadium	79
Sale of Property; Disposition of Proceeds	390
Sites; Acquisition by Condemnation	641
Sites; Condemnation Proceedings	666
Sites; Exchange of	673
Sites; Must be within Boundaries of District	399
Sites; Title to School Site; Capital Outlay	62
Special School Tax	616
Special Tax School Districts; Chapter 559, Public Laws of 1935	62
State Self-Insurance Act; School Buses	385
Street Paving Assessments; Liability of Schools	693
Superintendents; Conditional Resignation	618
Supplemental Elections; Date	700
More than one	645
Population of School District	704
When may be Held	694
Supplemental Tax Election in City Administrative Unit; "Tax Levying Authorities"	84
Supplemental Tax; Property of Indians; Liability to Tax	82
Supplements	393
County Commissioners not Compellable to Make	670
Election Cost	667
From Fines, Forfeitures and Penalties	74
Used for School Operation	690
Surplus Funds; Authority to Appropriate for Construction of Superintendent's Residence	672
Tax Districts from Portions of Contiguous Counties	66
Teachers; Contract in Writing	638
Contracts; Mitigation of Damages	73
Contracts; Transfer of Teachers	75
Emergency; Continuance of Contracts	703
Funds to Pay for Breach of Contract	73
Extending Term	393

Grounds for Refusal of Election	659
Leave of Absence; Resignations	78
Notice of Rejection	619
Notice of Resignation	388
Physical Examination of Teachers and Employees	63
Responsibility on School Grounds	387
Salary for Less than Month	391
Substitute; Compensation	662
Termination of Contracts	69
Teaching Days; Extension of Hours; Effect	400
Tort Liability	401
Transfer of Current Expense Fund Items	400
Tuition; Out-of-District Pupils; Credit for Taxes Paid	67
Use and Control of School Property	64, 387
Use of Capital Outlay Funds	396
Use of School Baseball Park by Professional Team	81
Secretary of State: Opinions to	42-48
Seed Law: Venue	264
Senate Bill No. 353; Gordon Gray Act	607
Sentences: Cumulative and Concurrent	352, 353, 355
Shelby Cotton Mills: Income Tax	119
Sheriffs: Vacancies; Terms for which Vacancies Filled	701
Soil Conservation Districts:	
Election and Terms of Supervisors	414
Term of Office of District Supervisors	640
Solicitation of Funds and Alms	497, 504
Solicitors: Emergency Bonus, 1946 and 1947	50
Southern Highland Handicraft Guild, Inc: Income Tax	115
Special Police: Merchants Patrol	40
Special Proceedings: Ex Parte Proceeding for Partition; Infants	643
Staff Personnel	17
State Advisory Council for Medical Care Commission: Expenses	537
State Auditor:	
Lost Warrants; Warrants Held After 60 Days	423
Opinions to	49-52
State Banking Commission	20
State Board of Accountancy:	
License Fees; Veterans' Exemption	628
Opinions to	560-561
Veterans; Exemption from Payment of License Fees While in Military Service ..	560
State Board of Assessment	20
State Board of Charities and Public Welfare: Opinions to	467-506
State Board of Corrections: Opinions to	509
State Board of Education: Opinions to	385-401
State Board of Elections:	
Opinions to	583-586
Authority to Permit F.B.I. to Examine Absentee Ballots	583
State Board of Examiners, Plumbing and Heating Contractors:	
License Requirements	528
State Board of Health:	
Opinions to	357-384
Prison and Prisoners; Inspection Authority	378
State Board of Medical Examiners:	
Duty to Revoke License of Physicians	549
Meetings; Place	548
Opinions to	548-550
Per Diem and Expenses for Members and Officers	550
State Board of Pharmacy:	
Authority to Adopt Standards	564
Members of	567
Opinions to	562-570
State Board of Public Welfare:	
Charitable and Penal Institutions	509
Old Age Assistance; Secrecy as to Recipients of Aid	669
Opinions to	467-506
Prisons and Prisoners; Inspection Authority	378
Solicitation of Alms; License	472
Solicitation of Funds and Alms	497, 504
Solicitation of Funds and Alms; "United Subscription Service"	501
State Banks of 1860; Compromise of 1879	55
State Bureau of Investigation:	
Report to the Attorney General	705-719
Summary of Activities	17
Summary of Cases Investigated	720-726
State College: Contract with F.P.H.A., No. N.C.-V-31186	295
State Commission for the Blind:	
Bureau for Employment for the Blind; Public or Private Agency	571
Opinions to	571-579
Qualification of Beneficiaries; Citizen of the State	573
Qualification of Beneficiaries; Establishment of County Residence	578
Qualification of Beneficiaries; Legal Settlement	574, 578
State Committee for Traffic Safety: Solicitation of Funds and Alms	497

State Correctional Institutions: Discharge from; Juvenile Courts	609
State Department of Agriculture	21
State Departments and Agencies	22
State Department of Archives and History	277, 425
State Employees:	
Torts: Liability Insurance	590
1947 Bonus Act	318
State Highway and Public Works Commission: Opinions to	351-356
State Hospital:	
Business Manager; Double Office Holding	590
Funds Belonging to Veteran Patients	587
Legal Settlement	590
Opinions to	587-593
State Licensing Board for Contractors: Purchase of Equipment and Supplies	609
State Parks: Authority to Collect Fees	514
State Property:	
Fire Insurance; Replacement of Property	691
Insurance Fund	302
State Superintendent of Public Instruction:	
Duties	61
Opinions to	57-86
State Teachers Colleges:	
Eminent Domain	596, 597
Investment of Endowment Fund	596
Opinions to	594-599
Supplementary Entrance Requirements	594
Veterans; G. I. Bill of Rights; War Bonus	595
Veterans; Tuition	596
State Treasurer:	
Bonds of 1860; Right to Compromise	55
Opinions to	53-56
Vance Memorial Fund	510
State Veteran's Commission: Opinions to	559
Statute of Limitations:	
A.B.C. Act; Taxation	121
Income Tax	212
Income Tax; Federal Correction of Income	97
Streets:	
Assessments; Land Liabe	629
Assessments; State-Owned Property	642
Closing; Damages	644
Dedication; Revocation of Dedication Before Acceptance	686
Eminent Domain	618
Liability for Street Maintained by State	664
Municipal Corporations; Opening and Closing	80
Paving Assessments; State-Owned Property	587
Summary of Activities of Attorney General's Department	17
Sundays: State Law, Municipal Ordinances	696
Superintendent of Public Instruction: Opinions to	57-86

T

Taxation:	
Ad Valorem; Building Destroyed by Fire	692
Certification and Validity of Assessments	234
Cotton Stored in Bonded Warehouse	652
Exemption of Property Sold to Church After January 1	679
Industrial Property	693
Interest on Delinquent Personal Property Tax	671
Lien of Personal Property Tax on Realty	685
Listing; Advances Against Farm Products	688
Penalties; Application to Supplement School Funds	76
Personal Property	617
Personal Property of G. I. Students	683
Piccolos	634
Tax Situs of Personal Property	684
Valuation by Municipal Corporation	650
Veteran Amputee's Automobile	676
Waiver of Penalties	626
Beer and Wine Tax Distribution	208, 212
Beer Licenses; Retail	248
Counties; Exemption; Poor and Infirm	622
County Boards of Education; Gasoline Tax exemptions	201
Dog Tax	683
Excise Tax; Beer Crown Tax; Refund	242
Exemptions	621
Federal Estate Tax; Apportionment	668
Franchise Tax; Agricultural Ass'ns.	246
Broyhill Educational Fund	157
Exemptions	211
Lakewood Club	245
Marketing and Co-operative Ass'ns.	180

Motorcycle Clubs; Exemption	243
Mutual and Co-operative Ass'ns; Exemptions	232
Mutual Groceries	244
Neca, Inc.	97
Power and Telephone Companies; Levy by Municipality	672
Remission of Tax Due and Unpaid	210
Gasoline Tax; Ashford Oil Co.	199
Bookmobiles	522
Computation and Basis	201
Exemptions	555
Rebates	171
School Trucks	659
Standard Oil Co.; Refunds	201
Gross Revenue Tax; Motor Vehicles	347, 348, 349
Income Tax:	
Alimony Not Deductible	677
Amortization of Bond Premiums	233
B. C. Remedy Co.	211
Business Leagues	246
Carolina Chapter, Neca, Inc.	97
Casualty Losses	114
Charitable Organizations	600
Club Grocery Stores	692
Confederate Widows Pension	114
Contributions to Recreation Foundation	156
Corporate Business Expenses; Contributions to Welfare Trust for Employees	195
Corporations "Doing Business"	91
Deductions; Contributions to College Fraternity	95
Contributions to Veterans Memorial Park, Inc.	182
Contributions to Welfare Ass'n	187
Gifts by Corporations to Employees	131
Income Earned Out of State	219
Incompetent Dependents	249
Loss from Sale of Property Out of State	215
Loss in State Having No Comparable Tax	96
Loss Through Misappropriation of Guardianship Funds	179
Medical and Hospital Expenses	178, 185
O. P. A. Overcharges	94
Parent and Subsidiary Corporations	172
Peace Officers' Pension Fund	214
Pension Trusts	184
Domestic Corporations; Income from Out-of-State Branch	175
Exemptions; Broyhill Education Fund, Inc.	157
Co-operative Associations	250
Head of Household	95, 181
Tar Heel Motorcycle Club	243
Expenses of Guardian or Trustee	107
Family Partnership	169
Federal Correction of Income	161, 180, 191
Refunds	98
Sec. 334 Rev. Act	198
Statutory Limitations	97
Fiduciaries; Non-Resident Beneficiary of Resident Trust	231
Foreign Corporations	222
Foreign Corporations "Doing Business"	172
Federal Contracts	87
Income from Partnership in Taxing State	174
Operating Through Independent Contractor in this State	170
Subsidiary Corporations	658
Unitary Business; Deductions	225
Foreign Partnership	219
Gain from Forced Sale	150
Gain at Maturity of Endowment Policy	90
Gain or Loss from Involuntary Sale	122
Gain or Loss Where Proceeds of Sale Retain Character of Realty	122
Gross Income; Insurance Proceeds	132
Guardian's Litigation Expenses	150
Lakewood Club	245
Income Producing Property in This State Owned by Non-Resident	663
Liquidating Dividends; Taxability	91
Litigation Expenses	150
Marketing and Co-operative Ass'ns	180
Motion Picture Films	222
Mutual Groceries	244
National Securities Series Dividend	183
Non-Residents Income Earned in State	192
Partnerships	104
Refund or Abatement of Ad Valorem Taxes as Deduction	167
Resident Trustee's Liability	111
Renegotiation of Federal Contract	180
Salaries in Violation of Federal Act	207
Shelby Cotton Mills	119

Southern Highland Handicraft Guild, Inc.	115
Statutory Allocation Formula; Constitutionality	158
Statute of Limitations	212
Trusts; Income from Corporate Dividends	662
Woman's Club of Dunn, N. C.	152
Inheritance Tax; Computation; Deduction from Specific Legacy	118
Computation; Re: Estate of Jessie Ella Parkinson	161
Computation on Life Interest in Residuary Estate	142
Computation on Residuary Estate	127
Deductions; Cost of Burial Lot	127
Deeds; Construction	107
Dower; Ante-Nuptial Agreement	240
Insurance; Change of Beneficiary; Estate of W. Loeber Landeau	149
Estate of Lucile Way Wyrick	110
Proceeds of Assignment of Policy	205
Resident Insured, Non-Resident Beneficiary	159
Legacies to Charitable Institutions	645
Power of Appointment	153
Remainder in Real Estate	658
Reservation of Income by Trustor	235
Safety Deposit Box; Co-Tenants	658
Time of Valuation of Estate	186, 683
Trusts; Reservation of Income for Life	102, 235
Valuation of Beneficiaries Interest in Trust Estate	188
Waiver Necessary for Stock Transfer	618
War Bonds	625, 657
Will Contests; Computation	220
Inspection Tax; Linseed Oil	265
Intangibles Tax; Bank Deposits of American Legion	251
Bank Deposits of Foreign Corporations	252
Bank's Right to Assume	408
Deductions; Accounts Receivable; Evidence of Debt	247
Distribution of	635
Exemption; Carolina Chapter, Neca, Inc.	97
Non-Resident Bank Depositors	627
Resident Beneficiary of Foreign Trust	203
License Tax; Agricultural Fairs; What Constitutes	140
Astrologers	651
Bad Checks	213
Cigarette Dispensers	625
Circuses; Use of Vehicles	224
Cleaning and Moth-proofing in Home of Owner	166
Clubs Selling Meals	203
Coin-operated Radios	181
Contractor	624
Detectives	662
Disabled Veterans	657
Emigrant Agents	186
Engineers; License in Firm's Name	663
Freezer Lockers	620
Hotels, etc.	218
Mentalists and Astrologists	106
Motor Advertisers; Sec. 151 1/2 Rev. Act	116
Peddlers; Fresh Fruit and Vegetables	682
Peddlers; Persons Selling Fish	675
Peddlers; Selling by Sample for Immediate Delivery	687
Phonettes	120
Public Accountants	682
Self-Service Laundries	170
Trading Stamps	652
Liens; Certificate of Tax Liability	641
Motor Vehicles; Franchise Haulers; Gross Revenue Tax	322
Municipal Corporations; Counties; Hospital as a Necessary Expense	243
Municipal Corporations; Motor Bus Franchises	289
Municipal Tax; Cancellation	669
Poll Tax; Exemptions	629
Refund of Tax to Disabled Veteran	647
Veterans; Exemption	694
Veterans; Penalty and Interest	653
Premium Tax; Insurance Companies	293, 297
Privilege Tax; Insurance Agents	302
Privilege Tax; Jewelers	663
Property Owned by Individual But Used for Church Purposes	625
Relief of Indigent Poor	502
Revaluation; Personal Property Exemptions	655
Revaluation of Real Estate Not Applicable to Horizontal Increase of Values of Personal Property	651
Sales Tax; Air Rifles	703
Cement for Manufacture of Cement Blocks	674
Exemptions; National Banks	88
Fleet Owners; Exemptions	237
Fuel Oil for Tobacco Curing	666

Increasing Price to Include Tax	623
Industrial Commission Funds	448
Interstate Commerce; Shipment to Non-Resident	89
Prefabricated Houses	105
Sales to Housing Authority	152
Interstate Commerce; Shipment to Non-Resident	89
Used Automobile Parts	628
Sales & Use Tax; Clubs Selling Meals	203
Cost-Plus-Fixed-Fee Contract	197
Cost-Plus-Fixed Fee Contract with Federal Government	150
Credit; Out-of-State Property	124
Ecusta Paper Corporation	200
Electrical Equipment; Mill Machinery	197
Federal Savings & Loan Ass'n Not Exempt	117
Merchants Dealing with Non-Resident Wholesaler; Failure to Make Return	224
Mill Machinery and Equipment	200
Motor Vehicles; Chassis and Bodies	194
Out-of-State Purchases Brought into State for Packing	159
Panel Partitions; Maximum Tax	253
Prefabricated Houses	229
Tangible Personal Property in Transit	656
Trustees and Commissioners; Liability Limited	659
University of North Carolina; Carolina Inn; Schedule B	422
University of North Carolina; Matriculation Fees	416
Unlisted Property; Back-Listing	660
Veterans; Automobile to Amputee	646
Tax Certificates; Judgments	633
Taxicabs:	
Operation within Municipality Without Permit	615
Stands	660
Teachers; See Schools	
Teachers' and State Employees' Retirement System	21
Retirement System; N. C. State Employment Service Division	444
Opinions to	450-466
Title Insurance; Examination Fee	293
Trade Marks; Lanham Act	43
Tree Surgeons; Taxation	623
Truck Act of 1947	289
Trustees; Income Tax; Administrative Expenses	107
Trusts; Non-Resident Trustor Becoming Resident; Inheritance Tax	235

U

Unemployment Compensation: Employment Service Division;	
Return to State Control	432, 435
Unemployment Compensation Commission; See Employment Security Commission	
United States Savings Bonds; Use of Collateral	653
U.S. War Bonds; Issued in Name of Husband and Wife; Inheritance Tax	695
U. of N. C.:	
Carolina Inn; Taxation under Schedule B	422
Federal Taxation of Matriculation fees	415
Fire Insurance Coverage	419
University of N. C. Foundation; Authority to borrow Money	402
U. of N. C.:	
Milk Contracts	421
Motor Vehicles; Windshield Stickers	420
Opinions to	414-422
State Property Insurance Fund; Coverage	302
Traffic Regulation on Campus	418
Trustees' Authority to adopt ordinances	420
Tuition; Resident & Nonresident Students	417, 418
Workmen's Compensation Act; State as Self-Insurer	414
Utilities Commission:	
N. C. Truck Act of 1947	289
Opinions to	278-290
Overcharges of intrastate passenger fares; Refund	279, 286

V

Vance Memorial: Donations	510
Veneral Disease: Authority to treat and control patients	378
Veterans:	
Accountancy License Fees; Exemption	628
Children of; Educational Advantages	559
Citizenship; Discharge other than Honorable	651
Commitment to Veterans' Administration Hospital	691
Minors; Conveyances	290
Conveyances by Minor Veterans & Wives	290
"Disabled"; definition	526
Disabled; Refund of Poll Tax	647
Discharged other than Honorably; Benefits	632

Exemption from Poll Tax	617
G.I. Bill of Rights; Out-of-State aid	607
Minors; Guardians	684
Licensing Boards; Exemption from Payment of License Fees While in Military Service	560
Non Compos Mentis; Commitment or Transfer to Veterans Administration	684
Poll Tax; Exemptions	694
Poll Tax; Penalty and Interest	653
Preference under Merit System	526
Recreation Authorities Law	632
State Hospital; Funds Belonging to Patients	587
State Teachers College; G.I. Bill of Rights; War Bonus	595
State Teachers Colleges; Tuition	596
Taxation of Amputee's Automobile	646, 676
Wills, Minors	559, 682
Veterans Commission: Opinions to	559
Vital Statistics:	
Birth Certificate; Adopted Child; Procedure	367
Birth Certificates; Change of names of illegitimate children	374
Birth Certificate; Name of father	382
Certificates; Fees	362
Child of Bigamous Marriage; Change of name	377
County Contribution to Registration Expenses	376
Delayed Birth Certificate; Procedure	369
Foreign Born Children; Foreign Marriage	644
Foreign Born Children; Registration	363
Foreign Marriage Records	363
Local Appropriations	370
Volunteer Fire Departments: Rules & Authority	313

W

Water Mains: Gas or Sewer Mains; Cost of Construction	647
Weapons: Sale; Clerks Certificate	630
Weights & Measures:	
Milk packaging; Tolerances	271
Types	264
Western Carolina Teachers College: See State Teachers Colleges	
Wills:	
Inheritance Tax; Computation; Will Contests	220
Validity; No Provision for One Child	661
Veterans; Minors	559, 682
Wildlife Resources Commission: Opinions to	556-558
Wine: See Intoxicating Beverages	
Witnesses: Authority of Dept. of Conservation & Development to subpoena	515
Workmen's Compensation Act:	
Caswell Training School	592
Jurors	695
Meaning of Word "Physicians"	614
Workmen's Compensation and Industrial Commission	22

